Nos. 80-1190 and 80-1193

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OCTOBER TERM, 1981

PULLMAN-STANDARD, a Division of Pullman, Incorporated,

Petitioner,

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners,

v.

LOUIS SWINT and WILLIE JOHNSON, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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IN THE

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PULLMAN-STANDARD, a Division of Pullman, Incorporated,

Petitioner, No. 80-1190,

UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 1466, UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioners, No. 80-1193,

v.

LOUIS SWINT and WILLIE JOHNSON, et al.

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On Writs of Certiorari to the United States Court of Appeals For The Fifth Circuit

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BRIEF FOR RESPONDENTS

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STATEMENT OF CASE

A. Proceedings

This employment discrimination case

was filed as a class action against Pullman-Standard, the International Association of Machinists and its Local 372 and the United Steelworkers of America and its Local 1466. The Bessemer, Alabama plant of the Pullman-Standard Company, the plant which is the focus of this lawsuit, has been closed permanently. 1/

This case has been tried three times and has resulted in three district court and two appellate court decisions. Only the third trial concerned the issue, the bona fides of the seniority system, before this Court.

The original complaint was filed on October 19, 1971, pursuant to Title VII

1/ Accordingly, the issue of appropriate injunctive relief in this case is now moot, since no employee works at the plant. The case is not entirely moot since the class of black workers seeks monetary relief for earnings lost as a result of the discriminatory seniority system.

of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. §1981. App. 1-2.[2/] In the original complaint, the claims of discrimination were made against the Pullman-Standard Company and the United Steelworkers of America and its Local 1466, the bargaining representative of the majority of production and maintenance employees at the Bessemer plant. The complaint was amended in order to name the International Association of Machinists and its Local. JA 14-25.

At the pre-trial conference on June 4, 1974, the district court granted leave to add the Machinists as a defendant "insofar as the relief requested may involve or

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2/ References are made to the opinions of the lower courts reproduced in the Appendix to the Petition for a Writ of Certiorari submitted by the Steelworkers.

infringe upon the provisions of such Union's collective bargaining agreement, it being noted, however, that no request for monetary relief is being sought against said Union." JA 29.[3/] The pre-trial Order further included as a trial issue the plaintiffs' claim that the seniority system unlawfully perpetuated discrimination because, inter alia, the "rights of transfer do not apply to jobs ... represented by the IAM." Id.[4/] At the

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3/ Also, the district court determined "that this action may hereafter be maintained on behalf of all black persons who are now or have (within one year prior to the filing of any charges under Title VII) been employed by defendant Company as production or maintenance employees represented by the United Steelworkers." JA 28; see App. 124, n.20. The first EEOC charge which alleged a discriminatory operation of the seniority system and discriminatory job assignments was filed on March 27, 1967. App. 50 n.5.

4/ The Company erroneously maintains that the district court limited the senior-

opening day of trial, the district court noted that Local 372 of the Machinists "is the certified labor union at Pullman-Standard" and granted leave to add Local 372 as a defendant "for the limited purpose that a part of the relief sought by the plaintiffs may involve some modification to the collective bargaining agreement between the Machinists and the defendant company." JA 31. The IAM and Local 372 were represented by counsel throughout the district court litigation.[5/]

4/ Continued

ity issue to "the system ... in the Pullman USW contract." Brief 3. The Steelworkers wrongly state that the issue before this Court is "that the system maintained by the Company and USW violated these [fair employment] laws." Brief 3.

5/ In the district court, Mr. Falkenberry, formerly a member of one of the firms representing the Steelworkers before this Court (JA 28, 41), represented the IAM and its Local 372 as well as the

The initial trial, covering 16 days in 1974, proceeded "on the theory ... that a violation of Title VII could be shown by proof of a neutral seniority system which perpetuated the effects of pre-Act discrimination. Trial was conducted on such a limitation of issues, with consequent inattention by plaintiffs to possible evidence showing the seniority system to have been instituted or maintained contrary to Section 703(h)," (emphasis added). App. 46-47. In its September 1974 decision, the district court held that "[w]ith the limited exception of expanding somewhat eligibility to transfer rights ... the various claims and items of relief sought

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5/ Continued

Steelworkers and its Local 1466. The IAM and its Local 372 were joined for injunctive relief only; apparently because this issue is now moot, these defendants have neither filed a brief nor entered an appearance in this Court.

by plaintiffs are due to be denied." App. 153-154.

In a unanimous opinion, the Fifth Circuit (Coleman, Clark, Gee, JJ.) held that the district court had misapplied the appropriate legal standards and had committed "patent inaccuracies" in its factual analysis. App. 89. The Court defined the nature of the "prima facie inquiry" on remand in order "to eliminate the likelihood" that "[e]rrors apparent in prior proceedings" would "recur on the reconsideration we now mandate." App. 90.

In February 1977, the district court held a two-day remand proceeding devoted primarily to the introduction of additional evidence regarding the assignment of employees, promotion of supervisors and statistics. The district court delayed ruling "in anticipation" of the Teamsters

decision. App. 48. Before the parties had an opportunity to present evidence pursuant to the standard for defining a bona fide seniority system prescribed by Teamsters, the district court held that the seniority system was lawful pursuant to the Teamsters standard. App. 51-58. The district court also ruled that Pullman-Standard had not discriminated in its selection of supervisors and, reversing its own 1974 finding, that after December 1966 the Company had not discriminated in making job assignments. App. 53-66.

Having had no opportunity to present evidence relevant to the standard established by Teamsters, the plaintiffs moved for a new trial.[6/] After grant-

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6/ The plaintiffs also requested that the district court produce a "chart" which it had developed and upon which it relied. App. 53. The district court refused, App. 124, and the chart remains secret.

ing the motion, the court heard two witnesses at a short hearing lasting less than three hours.[7] However, voluminous docu-

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6/ Continued

While the district court stated that the chart need not be produced, inasmuch as it merely summarized evidence already in the record, App. 45, the court of appeals found that there were unexplained and unexplainable inconsistencies between the district court's factual statements based on the secret chart and the record exhibits upon which the chart was supposedly constructed. App. 7.

7/ Only the plaintiffs called witnesses. Mr. Samuel Thomas, a black employee at the company since 1946, testified as to segregation in seating at the union hiring hall and at union-sponsored social activities as well as the racial composition of union officers and negotiators. The other witness Mr. Willie James Johnson, also a long-time black employee, testified regarding the segregation at the Company and union hall, the racial identity of various International Representatives and the handling of grievances regarding racial discrimination. Neither witness was subjected to extensive cross-examination and neither petitioner attacks the credibility of these witnesses. Transcript 1-67 (1978 Trial).

mentary evidence[8] was introduced regarding the development and maintenance of the seniority system from 1940 through the 1970s. After reviewing this "paper" record[9] the district court held that the seniority system "is 'bona fide' and that the difference in terms, conditions or privileges of employment resulting thereunder are 'not the result of an intention to discriminate' because of race or color," App. 44.

The Fifth Circuit (Wisdom, Roney, Hatchett, JJ.) once again unanimously reversed the district court. The appellate court ruled that the lower court had improperly applied legal standards, and

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8/ The respondents introduced 112 exhibits and the Company and Unions introduced 27 exhibits.

9/ See United States v. General Motors Corp., 384 U.S. 127, 141 n.16 (1966).

that "[a]n analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made," (footnote omitted). App. 15. The Fifth Circuit also reversed the lower court's rulings that the Company had neither discriminated in the selection of supervisors nor in post-1966 job assignments, App. 7-8, 16-21. The Company's petition for a writ of certiorari was denied insofar as it sought review of the Fifth Circuit's ruling regarding the selection of supervisors and the assignment of employees.

B. Facts

Overview. The proper presentation of the legal issue in this case requires a description of the general racial policies

of the defendant Company and Unions, the accumulated racial impact of the decisions made by the defendants in developing the seniority system, and the specific racial impact of particular decisions made by the defendants. The evidence demonstrates that each of the defendants had blatantly racist policies, that the overall impact of the seniority system had substantially adverse consequences for black workers, and that specific decisions made by the Company and Unions tended to segregate further the plant and to limit the job opportunities of black workers.

1. Racial Policies of the Company and Unions

a. Pullman-Standard. The evidence is undisputed that the Company considered the race of an employee in practically every decision which it made in its Bessemer plant:

Both in 1941 and in 1954, racial segregation was extensively practices at the Company's Bessemer plant .... Bathhouses, locker rooms, and toilet facilities were racially segregated. 10/ Company records -- including employee rosters, 11/ internal correspondence, 12/ records of negotiation sessions, 13/ list of persons picketing 14/ included racial designations. In 1941 some of the "mixed" jobs even had different wage scales for whites and blacks. 15/ All company officials, supervisors and foremen were white ... (Footnotes added). App. 39, 13.

10/ The facilities remained segregated until 1967. JA 97.

11/ Employee identification numbers between 100 and 199 and between 300 and 1999 were given to black employees and employee identification numbers between 200 and 299 and 2000 and above, were given to white employees. JA 104; see Record, plaintiffs' exhibit 1 (1978 Trial).

12/ See e.g., JA 209-11, 220-11, 220-21, 223-27.

13/ See e.g., JA 208, 212-13, 222, 254, 256, 268, 270.

14/ See e.g., JA 219, 224-27, 255.

15/ JA 216-17, 220, 223, 252-53.

The jobs at the plant were segregated:[16] "Most of the jobs at the plant were by custom treated as 'white only' or 'colored.'" App. 39. At least until 1971 the Company maintained its discriminatory job assignment policies.[17] App. 162-63.

b. Steelworkers. As did the Company, the Steelworkers operated on

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16/ "Pullman's old records, quite incomplete, do reflect a mixing of the races in some of these jobs in the 1920's and 30's. Nonetheless, it is clear that by the late 40's many of the jobs had become racially segregated ...." App. 121 n.12, 71.

17/ As a result of an arbitration decision in March 1965 the practice of job segregation was breached. App. 55. This decision applied to one job, rivet driver. While it provided a "ground breaker" for ending strict job segregation, JA 53, the discrimination in job assignments did not end, as the Steelworkers allege, with the March 1965 arbitration decision. Brief 6, nn.9, 15. Both the district court in its 1974 decision and the Fifth Circuit in its most recent decision concluded that discriminatory job assignments continued after the March 1965 decision. App. 54-55.

a segregated basis.[18] "[R]acial segregation was extensively practiced ... in the local union hall ... Union meetings were conducted with different sides of the hall for white and black members,[19] and social

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18/ The Steelworkers stress that their "performance in general" was supportive of the economic rights of black workers. Brief 10 n.20. But see, W. Gould, Black Workers in White Unions at 397 (1977). It is not the general performance of the Steelworkers that is at issue in this case; rather, it is their practices at the Bessemer plant. As shown in the discussion in this section, the practices of Local 1466, Steelworkers, divided and segregated the membership during the period of the development of the seniority system.

19/ The Union maintained segregated seating at meetings until the first trial in this case in 1974. JA 92-93. The Union president, Mr. Henn, "said [the black workers] there is a white side and a black side." JA 94. The Steelworkers' assertion that "the record is not clear" as to whether [the segregated seating was] by mandate or personal choice," is error. Brief 12, n. 21.

functions of the union were also segregated." (Footnote added) App. 39. The Union maintained segregated restroom facilities in the meeting hall until 1967,[20/] and only integrated its facilities at the same time that the Company integrated its facilities. JA 96-97.

Since 1940 blacks have constituted a significant proportion of the membership of Local 1466 and blacks have served in certain officer positions. However, it is apparent that until 1970 black workers occupied only two elected positions, Vice-President and Financial Secretary, while white workers occupied the other three positions, President, Trea-

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20/ The Steelworkers concede that there were "separate washrooms at the local union hall into the 1960's." Brief 12.

surer, and Recording Secretary.[21] More importantly, during the the 1950s and early 1960s white union officials dictated that racial grievances would not be prosecuted, and black union officials would acquiesce by agreeing that "it wasn't time for it."[22]

21/ Company Exhibit 309 shows this division of positions from 1965 through June, 1970. JA 69-80. Furthermore, uncontested testimony makes clear that the same racial allocation of positions existed in 1946, JA 51-52, that "in the fifties there were blacks who served as vice president and secretary", JA 94, and that the first black served as President in 1970. JA 98.

22/ Willie Johnson, a black steward in the Paint Department from 1967 through 1973 testified as follows:

"A. In '63. And we had questioned the president about segregated job assignments at the plant. And he would always tell us, well, we have got white [32] jobs because you're going to stay on the black jobs, and the whites are going to maintain the white jobs. So about March of 1963,

The Steelworkers assert that during "the 1940's the Union maintained the ob-

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22/ Continued

thirteen black employees were dropped, laid off, I mean, and thirteen junior whites remained in the plant. So we thirteen black employees filed a thirteen grievance saying the company was discriminating. And when we came to the union meeting that Tuesday night, the president, when he called the meeting to order, he had the thirteen grievances. And he held them up in his hand, and he said, I have thirteen grievances here, racial grievances that have been filed by thirteen black employees out in the plant against the company. And he criticized those thirteen black employees for filing such grievance. And I want the rank and file to tell me whether or not to tear these grievances up or process them. Well, one white man got up and made a motion that he tear them up. But we had the majority that night of blacks, and we voted it down, and made a motion to process the grievances. And we did win the vote. But the president did not process the grievances. And later we went to the National Labor Relations Board and filed discrimination charges there. At that same night the secretary was Gus Dickerson. [33].

Q. Was Gus Dickerson a black man?

ject of removing the inequity of black workers being paid less than whites for the same job." Brief 12, n. 21. This objective was advanced at one meeting, JA 216-17; the Company's documents make clear however that it was the black workers in Steelworkers Local 1466 who were advancing this matter with little support from the

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22/ Continued

A. Yes, he was a black man. But he got up and told us he was not going to process a racial grievance. It wasn't time for it, and he wasn't going to do it.

Q. In your occupation as a member of the union during the fifties and early sixties, Mr. Johnson, did the black union officials press racial grievances or complaints of racial grievances at this time?

A. No. They would always say there wasn't time for it." JA 97-98.

The evidence contradicts the Steelworkers' assertion that "on no occasion did the vote on contract proposals divide along racial lines." Brief 12, n. 21.

white union members. For example, a 1945 Company memorandum indicates that

> there is now a very active movement on the part of the colored to push themselves to a point of doing the same job as the white man. This has been confirmed to me by the fact that representatives of the C.I.O. have stated to me [W. C. Sleeman, a company official] that they are having trouble all over the district with their colored membership to the extent that in some of the plants numbers of the colored have walked off the job.... We also know that in numerous meetings we have had recently the colored representation always inject negro differentials and that they should be permitted to have negro leaders over the negro man. JA 216-17. 23/

c. Machinists. During the period when the Machinists' bargaining unit was defined at the Bessemer plant, 1940 through

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23/ Similarly, in a 1951 Company Memorandum, a manager observes that "[w]e are inclined to think that the committee as a whole, with the exception of the colored, are not so interested in the wage inequity program as much as they are in a good

1944, see section 2. b, infra, the Machinists through their Ritual limited membership to "qualified white candidates." JA 348, 350.[24/] At the 1941 NLRB hearing regarding union representation at the Bessemer plant, a representative of the

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23/ Continued

substantial increase in money." JA 223. Also another Company Memorandum indicates that after a Company offer was made during negotiations for the 1947 agreement "several of the colored objected to it, stating that they wanted certain inequities corrected." JA 220.

24/ The plaintiffs had requested the district court to take judicial notice of this adjudicative fact. JA 346-50. The district court declined the request. App. 24 n.1. In United Steelworkers of America v. Weber, 443 U.S. 193, 198 n. 2 (1979), the Court took judicial notice of discrimination by craft unions. See M. Karson and R. Radosh, The American Federation of Labor and the Negro Worker, 1894-1949, in J. Jacobson, ed. The Negro and the American Labor Movement at 155-159; (1968); H. Northrup, Organized Labor and the Negro at 2-3, 9-10, 254 (1944).

Steelworkers stated that "it is my information that they [black workers] cannot belong [to the Machinists]." JA 145.[25/] Colon Clemons, a white employee who had progressed from a laborer to a machinist and then to a supervisor in the Tool and Die Department represented by the Machinists, testified that he joined the Machinists in 1941, that there were no black members of the Union at that time, and he could not recall ever seeing a black at a Machinists' meeting. JA 339-40. In 1941,

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25/ The Trial Examiner halted "this line" of questioning regarding race. The representative of the Machinists had asserted at the hearing that the Union "claim[ed]" "negro cranemen", JA 149, see Company Brief 5. In fact, the only crane operator position was located in the Steel Miscellaneous Department, which was staffed by a black employee, see plaintiffs' exhibit 109 (1978 Trial), JA 243-51; see also plaintiffs' exhibit 1 (1978 Trial). The Machinists did not seek to have this crane operator position included in their bargaining unit.

the Machinists did not petition the NLRB to represent any jobs that were staffed by blacks, despite the functional relationship of such jobs to other jobs included in their petition. Then they entered into a series of agreements that removed all jobs staffed by blacks which had been included in their bargaining unit by the NLRB. See section 2. b, infra. After this job switch, a black worker did not enter the Machinists' bargaining unit until 1970.[26/] App. 7.

26/ It appears that after 1943 four blacks were assigned to the welder helper job in the IAM unit. JA 255; Plaintiffs' Exhibits 2, 62 (1978 Trial). This position was not staffed at the time of unionization, and no blacks were in the IAM unit. JA 247. However, in May 1944 the job was ceded to the Steelworkers as part of the acquisition of three IAM departments by the Steelworkers. See n. 41 infra.

2. Recognition of Unions and Plant Division

a. Structure Prior to Union Certification. Pullman-Standard opened its Bessemer plant in 1929. Until the plant closed in January 1981, the Company built railroad cars in Bessemer. Production of the cars was based upon the receipt of special orders, which could range from a few cars to several thousand. Depending upon the size of the orders, the number of workers at the plant varied from several hundred to several thousand. App. 118-19 nn.3-4, 68 nn. 2-3.

In 1941 four unions sought to represent employees at the Bessemer plant.[27/]

27/ The Steelworkers sought to represent all the production and maintenance employees, while the Machinists and the International Brotherhood of Electrical Workers (IBEW) sought to represent specified units.

At this time the Company had approximately 1300 employees divided into twenty departments.[28] Of these departments, five contained employees of only one race. The Lumber Yard, Welding, Template and Plant Protection had only white workers, and the Truck Shop had only black workers. JA 103.

b. Certification of the Bargaining Units. The major focus of the 1941 NLRB hearing concerned the proposed unit which the Machinists sought to repre-

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27/ Continued

The Federal Labor Union sought to represent those production and maintenance employees excluded by the Machinists and the IBEW. JA 155.

28/ The "voting list" which was submitted to the NLRB listed 21 departments. JA 103. However, one department, Sand Blast, had no employees and does not appear on subsequent seniority lists. The voting list racially identifies employees. JA 104, plaintiffs' exhibit 1 (1978 Trial).

sent. See JA 105-49.[29] There are two critical aspects to IAM's representational claim: the Union sought to represent production as well as craft workers[30] and the Union selected jobs on the basis of the race of the job incumbents. For ex-

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29/ Although the district court stated that "the objective facts are not greatly in dispute," the court failed to describe these facts since it determined as a matter of law that the motivation of the IAM was irrelevant to the bona fides of the system. App. 42. The Fifth Circuit disagreed; "[T]he motives and intent of the IAM in 1941 and 1942 are significant in consideration of whether the seniority system had its genesis in racial discrimination. The IAM was one of the unions which unionized the company in 1941 and the evidence reflects that the IAM manifested an intent to selectively exclude blacks ...." Id., 14. See Argument, sections B. 2 and 5. infra.

30/ The Company mistakenly claims that the IAM only sought a "craft" unit of skilled workers and apprentices and helpers ...." Brief 3. The Steelworkers implicitly concede that the 1941 bargaining unit of the IAM included production jobs. Brief 24-25 n. 39.

ample, the IAM petitioned for the inclusion of cranemen in the Die and Tool and the Wheel and Axle departments, staffed only by whites, but not in the Steel Miscellaneous department, staffed with a black, JA 149, 155, 170, 247, 249, 251,[31/] and for the inclusion of handyman in the Die and Tool department, staffed only by whites, but not in the Maintenance department, staffed with a black, JA 155, 170, 249, 250. Also, the IAM requested that the following production jobs, as distinct from craft jobs, be included in its unit: "production ... welders" JA 155, 170,

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31/ Plaintiffs' exhibit 109, (JA 243-51) lists the racial composition of each job at the time of the certification decision. This exhibit was prepared from plaintiffs' exhibit 1 (1978 Trial). (The cover page of Plaintiffs' exhibit 1, a summary of the exhibit, contains some numerical inaccuracies, and the specific department listings should be examined.) The IAM did not claim all cranemen positions which were staffed by whites. JA 241, 246, 248.

117, production pipe fitters, JA 155, 170, see 127-29,[32] "wheel borer", JA 136-37, 155, 170, "tool grinder," id., and "axle finisher", id.[33] All these positions

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32/ The IAM sought to represent "employees in the air-brake department," JA 155 or, as later amended, "air brake production employees classified as pipe fitters, pipe fitter helpers, and air brake testers," JA 170. The plant manager, Mr. Sleeman, testified that these air brake production employees are "just a part of [the] ... production line," that they are part of the Steel Erection department, and that "[the Company does] not classify them as maintenance pipe men." JA 127-29.

33/ Mr. Howard, the Machinists' representative, JA 106, stated that "we claim" the employees in the borer, grinder and axle finisher positions in the Wheel and Axle department. JA 134-37. These were production workers. When asked whether these employees "are machinists," the plant manager replied "[a]bsolutely not, because we have taken a man right from the farm, and he is the best production man we ever had there...." JA 137. In reply Mr. Howard admitted that the jobs being sought by the IAM were not highly skilled: "I also appreciate the fact that you can take a chimpanzee and show him the opera-

were staffed exclusively by white workers. JA 246-47. The IAM did not seek to include in its unit other machine operator positions, like those in the Punch and Shear Department, JA 245, which were staffed with black employees.

Despite the attempts of the IAM to exclude from their bargaining unit any jobs to which blacks were assigned, the NLRB certification decision included jobs staffed by black workers within the Machinists' unit. Since the IAM had expressly requested some production jobs and expressly excluded only one job[34/] in the Wheel

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33/ Continued

tions in some of these departments and then put him on a chain where he cannot run away, and probably he can do that [the job]...." Id.

34/ Mr. Howard, the IAM representative, stated "I don't claim the hookers any-

and Axle department, the NLRB included in the IAM unit all jobs in that department and in the Truck department, JA 165-66, which were functionally related to the Wheel and Axle department. JA 119, 130-31. As a result 24 blacks, 14 in the Truck department and 10 holding four jobs in the Wheel and Axle department, JA 247, were placed in the IAM unit.[35/]

Within a month of the NLRB November 1941 certification, the Steelworkers and

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34/ Continued

where." JA 149. The hooker assists cranemen, JA 125. The Machinists sought to represent several craneman positions, yet they rejected inclusion in the unit of the functionally related job of hooker. The job was generally staffed, as in the Wheel and Axle department, with black employees. JA 247.

35/ The Machinists made clear to the Company that "they do not want [these employees]" but if necessary "they will accept them." JA 207.

the IAM agreed to a swap of jobs which removed all jobs staffed by black employees from the IAM unit and transferred two jobs staffed by two whites from the Steelworkers' to the Machinists' Unit. Compare JA 170-71 with JA 165-66.[36/] The Company endorsed the agreement, and it was included in the April 1942 collective bargaining agreements between the Company and the IAM, JA 167-71, and between the Company and the Steelworkers, plaintiffs'

36/ The agreement excluded crane hookers, wheel rollers and laborers and the Truck Shop from the IAM unit. All the 24 black employees in the designated IAM unit were in wheel roller, wheel roller helper or laborer positions or in the Truck Shop. JA 247. In return, the jobs of toolroom man and toolroom helper in the Steel Erection department, which were staffed by two white employees, JA 246, were transferred from the Steelworkers' to the Machinists' unit.

Exhibit 33 (1978 Trial).[37/]

As a result of the gerrymandering of the plant between the Machinists and the Steelworkers, the number of one-race departments increased from five to ten. Of the five all-white IAM departments, Tool and Die, Wheel and Axle, Air Brake, Millwrights (Maintenance), and Welders, JA 167, all, except Welders, had included employees

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37/ The Steelworkers claim that this transfer "contract[ed] ... the IAM unit to craft and highly skilled jobs." Brief 24-25, n. 39. In fact, (1) the jobs remaining in the IAM unit were not all "highly skilled" or "craft," see nn.32, 33, supra; (2) the jobs removed from the IAM unit were functionally related to those that remained and required equal skill (see JA 119; 130-31 describing the Truck shop and Wheel and Axle department); and (3) the Steelworkers transferred two jobs in a production department, Steel Erection, to the IAM's unit, see n.36, supra. In keeping with their policy of limiting their membership to "white males," the Machinists simply "did not want" the black employees, see n.35, supra.

of both races prior to unionization.[38/] In addition, to these four new one-race departments, an all-black Die and Tool department was created in the Steelworkers' unit. The district court stated with respect to the creation of two Die and Tool and two Maintenance departments that "[n]o similar situation exists at Pullman's Butler and Hammond plants, and indeed there was no such division at Bessemer prior to unionization and seniority." App. 35. The

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38/ Die and Tool: The jobs staffed by blacks, hooker, and laborer were excluded from the IAM unit. JA 166, 170, 249. Maintenance: All the jobs selected for inclusion in the IAM unit from the Maintenance department were staffed by whites. JA 166, 170, 250. Air Brake: The jobs of pipefitter and pipefitter helper in the heavily black Steel Erection department and of air brake tester in the Shipping Track department, which were staffed by whites, were joined to form the Air Brake department in the IAM unit. JA 166, 170, 245-46, see n.32, supra. Wheel and Axle: Jobs staffed by whites were included in the IAM unit; those staffed by blacks were excluded. JA 237, n.36, Appendix A, para. A.

same observation is equally true with respect to the creation of separate all-white Air Brake and Wheel and Axle departments.

3. Development of the Seniority System

a. Division of Bargaining units. Both the Steelworkers and the Machinists entered into initial collective bargaining agreements with Pullman-Standard on April 7, 1942. Plaintiffs' exhibits 17, 33 (1978 Trial). The seniority agreements applied only to departments or jobs within the bargaining unit for which those unions were "recognized as the exclusive collective bargaining agent." The agreements did not provide any "seniority" rights for employees who transferred from one bargaining unit to another bargaining unit. An employee who transferred from the Steelworkers' to the Machinists' unit

would start as a "new man"; in effect, the worker who transferred bargaining units forfeited all job security.[39] The division of the plant into bargaining units seriously affected the employment opportunities of workers. As a practical matter, a worker would spend his entire career, unless he progressed to management, in the jobs of one bargaining unit.[40]

39/ The 1956 agreement between the Steelworkers and Pullman-Standard made this forfeiture provision explicit and clearly applicable to all transfers, even those instituted by Management: "An employee hereafter transferred to a position outside of the bargaining unit ... shall lose his seniority in the bargaining unit at the time of such transfer." JA 194. See also n. 45, infra.

40/ For example, white employee Colon Clemons testified that he entered the IAM's Die and Tool department as a laborer and progressed to craneman and machinist. JA 339. The seniority lists introduced into evidence show other similar job

Since the Machinists and the Steelworkers continued to represent employees in separate bargaining units until the plant closed in January 1981, the effects of the 1941 racial gerrymandering of bargaining units continued for four decades. Although the IAM bargaining unit was modified in 1944,[41] the IAM continued to represent employees in two departments, Maintenance and Die and Tool, until the plant closed. These departments remained all-white until 1970. App. 7.

40/ Continued

progressions and the general restriction of employees to one bargaining unit. See plaintiffs' exhibits 2-8 (1974 Trial), plaintiffs' exhibits 2-12 (1978 Trial).

41/ The IAM agreed to the transfer of the jobs in three departments, Welding, Air Brake, and Wheel and Axle, to the bargaining unit of the Steelworkers. JA 174-76.

A final change in the 1941 bargaining unit division at the plant occurred in 1946 when the jobs originally represented by the IBEW, were transferred into the bargaining unit represented by Local 1466 Steelworkers.[42/] App. 41, JA 298-304.

b. Application of the Seniority System Within the Steelworkers' Bargaining Unit. Initiated in the proceedings to unionize the plant in 1941, the seniority system continued to develop until 1954 when it reached the form it retained until the plant closed. "The division of the plant's work force into twenty-eight separate seniority units - 26 USW Units and

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42/ The International Brotherhood of Electrical Workers had been certified as the representative of two small groups of employees, electricians and powerhouse operators. App. 36, JA 165.

2 IAM units - has remained essentially unchanged since 1954," (footnote omitted).[43] App. 31. The importance of seniority within the Steelworkers' unit increased substantially after 1954 because (1) the scope of seniority was broadened from "occupational" to "departmental;"[44] (2) the discretion of the Company to transfer an em-

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43/ Since blacks were excluded from the Machinists' bargaining unit, the exercise of seniority rights of employees within that bargaining unit are not directly relevant to the issue before the Court. However, obstacles to transfer into the bargaining unit are directly relevant. See section a, supra.

44/ The first collective bargaining agreement between Pullman-Standard and the Steelworkers, signed in April 1942, provided for "departmental" seniority: "No employee shall hold seniority in more than one department ...." JA 181. In 1947 the seniority criterion was changed to "occupational": "Occupational seniority within a department will prevail for all employees ...." JA 189. In 1954 the parties reverted to the use of departmental seniority. JA 194.

ployee of the Company to transfer an employee without any loss of seniority to the employee was restricted;[45/] and (3) the use of seniority was extended from the determination of layoff or recall during an "increase or decrease of forces," JA 180, 182, 184, 188, to the determination of promotions. JA 201-02.

The expansion of seniority rights was preceded in 1953 and 1954 by numerous departmental readjustments, which, like the

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45/ In 1944, the collective bargaining agreement was modified to provide that if the Company transferred an employee because of "exceptional ability" he could continue to accumulate seniority in two departments. JA 185-86. The provision also applied during the period, 1947-1954, when occupational seniority was used. JA 189-90. In 1954 the provision was severely limited by, inter alia, requiring Management to "return" the transferred employee "within a period of one (1) year from date of transfer to his original department ...." JA 194-95. See also n.39, supra.

departmental changes during unionization, increased the number of one-race departments. Since 1952 the negotiation positions of the parties had indicated that a return to departmental seniority was likely. In August 1952, the Steelworkers proposed that they negotiate a company-wide, master contract with Pullman-Standard. JA 286. At that time the Company had four plants where employees were represented by the Steelworkers, two had departmental seniority, one had plant seniority, and one (Bessemer) had occupational seniority. App. 33; 189, 278-85. The "company ha[d] established by ... contemporaneous studies made by it at the time of contract negotiations -- [that] seniority by departmental age ... was the modal form of agreements generally. ..." App. 33.

Several earlier departmental changes had little effect upon the seniority or employment opportunities of the workers who were protected at the time by occupational seniority only.[46/]

46/ The Electrical and Powerhouse departments were moved in 1946 from the defunct IBEW Unit to the Steelworkers. Three departments, Air Brake, Welding, and Wheel and Axle were transferred in 1944 from the Machinists to the Steelworkers. By 1947, Air Brake, Electrical, Powerhouse, and Wheel and Axle departments were reabsorbed in the departments they had been in before unionization. Plaintiffs' exhibits 1 and 2. (1978 Trial). The Welding department remained separate. Id. In the "late 1940's" the Company created a separate Inspection department staffed by white workers only. App. 32.

The record contains the departmental seniority lists from 1947 through 1954, plaintiffs' exhibits 2 through 9 (1978 Trial). From these lists it is possible to ascertain the departments, the jobs in the departments and the race of the employees in those jobs and departments. The race can be determined because the employee's number indicated his race, see n.11, supra. It is not possible to ascertain

In 1953 and 1954, just before the switch from occupational to departmental seniority, seven new one-race departments were created within the Steelworkers' bargaining unit: Air Brake Pipe shop, Boilerhouse, Die and Tool, Janitors, Plant Protection, Powerhouse, and Steel Miscellaneous.[47/] Four of the depart-

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46/ Continued

from the record whether from 1944 through 1946, the three former IAM departments or whether in 1946 the two former IBEW departments remained separate departments within the Steelworkers' unit or were reabsorbed into other departments in the Steelworkers' unit. The district court's assertions as to the status of the departments at this time, see App. 41, 37 n.19, do not have record support. The chart prepared by the company and introduced as exhibit 27, JA 336, which purports to show the departmental changes at the plant, is riddled with errors. See Appendix A to this brief.

47/ Six of these departments were created in June 1954 -- just two months prior to the return to departmental seniority. Compare plaintiffs' exhibits 8 and 9.

ments contained only white employees: Air Brake Pipe shop, [48] Boilerhouse, Powerhouse, [49] and Plant Protection. Three of the departments contained only black employees, Die and Tool, [50] Janitors, [51] and

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48/ Jobs in the Air Brake Pipe shop were functionally related to jobs in the integrated Steel Erection department, see n.32, supra. Nevertheless, several jobs, staffed by white employees only, were removed from this department in order to form the Air Brake Pipe shop. Compare plaintiffs' exhibits 8 and 9.

49/ The Boilerhouse and Powerhouse departments were removed from the Maintenance department. The Powerhouse jobs had been in the Maintenance department prior to unionization and during the period when occupational seniority prevailed in the Steelworkers' unit. The Boilerhouse had always been located in the Maintenance department. See n.46, supra; JA 243-51.

50/ The Die and Tool (CIO) department was staffed entirely by black employees after unionization, see p. 33, n.38. However, by 1947 the position of Welder, staffed by

[Continued]

[51/ on next page]

Steel Miscellaneous.[52] Therefore, coincidentally with the establishment of depart-

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50/ continued

whites, had been added to this department. Plaintiffs' exhibit 2. In 1953 there were two whites, Moreland #2448 and Thompson #2447, in the Welder job. In 1954 these positions had been moved to the Welding department and the Die and Tool (CIO) department was resegregated. Plaintiffs' exhibits 8 and 9.

51/ The court of appeals correctly summarized the history of the Janitors department: "between 1947 and 1952, the all-white watchman and all-black janitors were both in the Safety department. The 1953 seniority list carries both jobs under a Plant Protection department. The 1954 seniority list shows the janitors in an all-black Janitors department and the watchmen in an all-white Plant Protection department." App. 12; see plaintiffs' exhibits 2-9.

52/ In 1953 the Steel Miscellaneous department was separated from the Steel Stores department. Plaintiffs' exhibits 7 and 8. See also Appendix A, paragraph G. The district court finding that the two units "had roughly comparable racial compositions" is misleading. App. 31-32. In 1953 the Steel Stores department contained 5 white and 26 black workers.

mental seniority and with the increase in the importance of seniority and the departmental structure, a substantial number of one-race departments were created in the Steelworkers' unit.

4. Operation of the Seniority System After 1956. The departmental and bargaining unit structure which had evolved by 1954 remained "essentially unchanged."[53/] App. 31, 3. The depart-

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52/ Continued

Plaintiffs' exhibit 8. However, all the production employees in the Steel Miscellaneous department were black. While the seniority list shows 2 whites out of the 64 workers in the Steel Miscellaneous department, it is critical to note that those two white workers were "leaders" or "foremen A." Plaintiffs' exhibits 8, 11. In keeping with the policy of placing only whites in supervisory positions, see section B. 1. a, supra, the two supervisors in the department were white.

53/ The Boilerhouse department in the Steelworkers' unit was closed in 1964.

ments and their racial composition in 1956 and 1964 are listed in Appendix B to this brief. Apart from a limited order entered by the district court in 1974, see n.62, infra, the application of seniority remained essentially the same as established in the mid-1950s. In brief, there was no provision for transfer between bargaining units and an employee forfeited seniority if he transferred between bargaining units or between departments within the Steelworkers' unit. App. 119-20, 26, see also section 3, supra. The district court correctly characterized the effect of the seniority forfeiture provision as a

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53/ Continued

App. 31, n. 5. Also by 1964 the Shipping Track and Paint departments had been merged. See Tables 1 and 2, Appendix B.

"no-transfer rule." App. 30;[54/] see also App. 3.

In 1968 the Company entered into negotiations with the Office of Contract Compliance, Department of Labor. These negotiations led "to a conditional memorandum of understanding designed to enhance opportunities for blacks," (footnote omitted). App. 122. The conditional memorandum included "transfer rights with seniority carryover for black employees" from certain "low-ceiling" departments to "formerly all-white departments." App.

54/ While there was no express bar to interdepartmental transfer, because of the seniority forfeiture provision, the system in effect "locked" employees into the department or bargaining unit to which they had been assigned. "In any industry loss of seniority is a critical inhibition to transfer," United States v. Jacksonville Terminal Co., 451 F.2d 418, 453 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

122 n. 15. The memorandum was rejected by the unions and never went into effect. App. 122, 136 n. 32; JA 41-42. In 1972 the Company once again entered into negotiations with the Office of Contract Compliance. On this occasion Pullman-Standard signed an agreement which was "to serve as a corrective action program." App. 6. The agreement provided limited transfer rights to certain black employees.[55/] Once again, the Steelworkers and Machinists failed to sign the agreement, App. 123 nn.17-18. Although the district court concluded that,

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55/ "Black employees with employment dates prior to April 30, 1965, are given preference for vacancies arising in the five traditionally all-white departments ... and those hired before April 30, 1965, who had been assigned to four 'low-ceiling' departments are given preference for vacancies arising in any of the departments." (Footnote omitted). App. 123.

despite their failure to sign, the Unions "apparently" agreed to accept its terms, id., the court issued an order declaring the agreement "binding upon the union defendants." App. 154.[56/]

5. Racial Impact. The district court concluded "that for each of the years 1967 through 1973 there were variations in the racial composition of the departments beyond that expected from random, 'color-blind' selection." App. 52. The court attributes this disparity to actions taken "prior to Title VII [enacted in July 1964, effective as of July 1965]." Id.[57/]

56/ The district court vacated this 1974 order when in 1977 it ruled that the seniority system was lawful and entered judgment for the defendants. App. 148.

57/ In order to support its conclusion, the district court stated that it had prepared a chart regarding post-1966

The district court never evaluated the severity of the "variations in the racial compositions of the departments." In fact, as of 1964 the overwhelming majority of employees at the Bessemer plant were located in racially identifiable departments: departments where there was a "serious disproportionality" in the racial composition of employees.[58/] In 1964[59/]

57/ Continued

departmental assignments. The court did not reproduce the chart in its opinion, App. 53, and refused the plaintiffs' request, made in a motion to amend the judgment, to produce the chart. App. 45. The conclusion based upon this secret chart, that post-1966 departmental assignments were not being made in a discriminatory manner, was reversed on appeal, App. 78,and this issue is not before this Court.

58/ The determination of "serious disproportionality" is based upon this Court's analysis in Hazelwood School District v. United States, 433 U.S. 299, 311 n. 17

[Continued]

[59/ on next page]

there were 3875 employees in 28 departments in the Bessemer plant. Of these employees, 3727 or 96% were located in racially identifiable departments; 1274 or 96% of

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58/ Continued

(1977). A detailed description of the methodology is incuded in Appendix B.

59/ The source for the distribution of employees in 1964 is the seniority list for that year which was introduced in the 1974 trial as plaintiffs' exhibit 2. The district court relied on this exhibit in constructing a chart for the year 1965. App. 127-28 n. 27. As the district court observed, there was no seniority list introduced for the year 1965, but the court determined that the "functional equivalent" of the 1965 list could be determined "by taking account of the additions and deletions" to the 1964 list. App. 120 n. 10. In this brief, the respondents used the same source as the district court, plaintiffs' exhibit 2 (1974 Trial), but we have indicated that the employment totals are for "1964," the year by which the seniority list is designated. Regardless of whether a designation of "1964" or "1965" would be more correct, the data reflects the employment composition at the plant on or near the effective date of Title VII.

the 1325 black employees and 2453 or 96% of the 2550 white employees were in racially identifiable departments.[60/] Appendix B, Table 1. The same analysis for 1956, the date when the seniority system had fully evolved, shows that the racial impact of the system was firmly established at that time -- over 85% of the employees were in racially identifiable departments. Appendix B, Table 2.

Despite the substantial racial allocation of employees by department, the

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60/ Nineteen of the twenty-eight departments in 1964 were racially identifiable, according to the statistical analysis in Castaneda and Hazelwood, since there was a "serious disproportionality" in the racial composition of these departments. See Appendix B. In addition to these 19 departments, there were an additional three departments which had historically been staffed entirely by white employees, Boilerhouse, Powerhouse and Template. See n.87, infra.

Steelworkers and the Company repeatedly assert that the "vast majority" of employees were in "racially mixed" or "integrated" departments. Steelworkers 6-7, 14-15, 27-28, 8a-11a, 20a-22a; Company Brief 10, 14, 42. The petitioners' use of the term "integrated," regardless of the disproportionality of the racial composition in a department, distorts the actual racial staffing of departments.

The racial staffing of departments and the "lock-in" effect of the seniority system had a serious adverse impact on the earnings of black employees. In 1964, 8 of the 28 departments had a median job class[61/]

61/ In the collective bargaining agreements between the Steelworkers and Pullman-Standard, jobs are placed within "job classes." The job classes range from 2 through 20, with 20 being the highest paid. The base hourly wage, incentive and non-

of 10 or above, thirteen departments had median job classes between 5 and 7, and seven departments had median job classes below 5. Appendix B, Table 3. Of the 2545 white employees, 1959 or 76.9% were in the eight departments with a job class median of 10 or above, whereas only 230 or 17.3% of the black employees were in these departments. In the "low-ceiling" departments, those with a job class median below 5, the racial proportion was reversed: 433 or 21.9% of black employees, whereas only 177 or 5.7% of white employees were in these departments. Id.

61/ Continued

incentive, for a job is determined by its job class, see e.g., 1965 Collective Bargaining Agreement, Company exhibit 263 (1974 Trial). The "job class (JC) level ... determines [a job's] relative ranking in base pay in comparison to other jobs," although piece-rate scales may play a role in the actual earnings potential of a particular job. App. 119 n. 8.

The continuing economic effect of the seniority system is illustrated by the disparity in the job class levels of black and white employees who were employed in 1973 in the Steelworkers' bargaining unit and who had more than 6 years of seniority: 551 or 74% of all black employees as compared to 119 or 16% of all white employees earned less than $4.25 an hour, job class 8 or below. JA 65. Moreover, 634 or 81% of all white employees as compared to 192 or 20% of all black employees earned more than $4.40 an hour, job class 10 or above. Id. The average hourly base rate for black employees in the Steelworkers' unit was $4.14 as compared to $4.45 for white employees. Id.

The historical exclusion of blacks from the IAM bargaining unit had a substantial adverse economic impact on blacks.

The two IAM departments, Maintenance (IAM) and Die and Tool (IAM) provide some of the greatest earnings opportunities at Pullman-Standard. Appendix B, Table 3. Of the 139 employees in the IAM unit as of June 1, 1972, 11 were black. No black in the unit had a seniority date earlier than 1971. The average hourly base rate of all employees was $4.57 an hour.[62/] In the

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62/ Plaintiffs' Exhibit 9 (1974 Trial) includes a seniority list of the two IAM departments as of June 1, 1972, from which can be computed the number of employees in each job. The above employee totals include only those employees who were in the IAM bargaining unit as of the date of the seniority list, June 1, 1972.

For each of the jobs in the IAM unit, the wage rates used were those in effect from October 1972 until October 1973. Those rates appear in the IAM 1971 collective bargaining agreement with Pullman-Standard. Plaintiffs' Exhibit 31 (1978 Trial). The 1972 IAM wage rates are used since the last complete IAM seniority list is a 1972 list. Where the hourly rates

Die and Tool (IAM) department where there were 67 whites and 5 blacks, the average hourly base rate was $4.52; in the Maintenance (IAM) department where there were 61 whites and 6 blacks the average hourly base rate was $4.62. The average hourly base rate of employees in the IAM bargaining unit exceeded that of blacks in the USW unit by at least $.43 per hour.[63/]

SUMMARY OF ARGUMENT

I.

A. "[I]n enacting Title VII of the Civil Rights Act of 1964, Congress intended

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62/ Continued

indicate a pay range for a particular job, the median rate for that job was used which rate was then multiplied by the total number of employees in that job.

63/ This figure understates the disparity in wage rates between blacks in the USW unit and workers in the IAM unit because 1973 wage rates are used for the USW unit and 1972 rates for the IAM unit.

to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976). In Pullman-Standard's Bessemer plant, as in other plants, particularly in the South, practices of racial gerrymandering and manipulation of seniority systems were common. The protection in Section 703(h) for "bona fide seniority systems" must not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures, or tests' that disproportionately affect members of those groups that the Act protects." California Brewers Association v. Bryant, 444 U.S 598, 608 (1980).

B. Section 703(h) "does not immunize all seniority systems. It refers only to 'bona fide systems'...." International Brotherhood of Teamsters v. United States, 431 U.S. 324 at 353 (1977). A seniority system is not bona fide and thus not lawful if its genesis, maintenance, or operation was affected by intentional discrimination. In "[d]etermining whether invidious discriminatory purpose was a motivating factor [it is necessary to make] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Corp., 429 U.S 252, 266 (1977).

Like other provisions of section 703(h), the provision immunizing discrimination -- the provision immunizing "bona fide seniority systems" creates an affirma-

tive defense by which an employer or union may demonstrate that its system is bona fide and lawful even though the system has a discriminatory effect. Requiring the defendants to bear this burden of persuasion is consistent with the intent of Congress', which determined that "a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." County of Washington v. Gunther, 49 USLW 4623 (1981).

The overtly racist practices of the Company and Unions, their actions which, at critical times in the development of the seniority system, promoted segregation, the serious adverse consequences of the system upon the employment opportunities of blacks, and the general lack of justification or rationality for their acts mani-

festly lead to the conclusion that the seniority system was not bona fide, and differences in treatment thereunder were the result of intentional discrimination.

The Company and Unions responsible for the seniority system each engaged in blatantly discriminatory practices during the period when the seniority system was developed. "[T]here is a high probability that where [an institution has] effectuated an intentionally segregative policy in a meaningful portion of [its system], similar impermissible considerations have motivated their actions in other areas of the system." Keyes v. School District No 1, 413 U.S. 189, 208 (1973). Moreover, during the period when the plant was unionized in 1941 and during the period when in the Steelworkers' unit the importance of seniority and departmental struc-

ture greatly increased, the Unions and the Company took a series of actions which increased the number of one-race departments in the plant. Where a sequence of events leads inevitably to increased segregation and where the actors involved constantly refer to race in making decisions, then the racial purpose of the actors is manifest. This conclusion is buttressed by the fact that the manner of the division of the plant into bargaining units in 1941 was irrational and contrary to NLRB principles.

In examining whether a specific act was undertaken with an invidious motive, it is essential to determine whether the act "bears more heavily on one race than another," Washington v. Davis, 426 U.S 229, 242 (1976). A showing of substantial racial "imbalance is often a telltale sign

of purposeful discrimination," Teamsters v. United States, 431 U.S at 339 n. 20. On the effective date of Title VII 96% of the employees in the Bessemer plant were located in racially identifiable departments -- black workers were concentrated in those departments and jobs with the lowest earnings while white workers were concentrated in those departments with the highest earnings.

II.

If a district court "premise[s] its ... finding[s] ... on an erroneous interpretation of the standard to be applied ...," the clearly erroneous rule does not apply and the findings may not stand. United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). The findings of a trial court based on a "paper case" do not carry the same weight on appellate

review as those based on oral evidence. The Fifth Circuit properly exercised appellate review by reversing the legal error of the district court and by concluding that a review of the documentary and other evidence "leaves us with the definite and firm conviction that a mistake has been made."

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE SENIORITY SYSTEM WAS INTENTIONALLY DISCRIMINATORY AND THEREFORE NOT PROTECTED BY SECTION 703(h) OF TITLE VII.

A. Section 703(h) Must Be Interpreted and Applied in a Manner Consistent with the History and Purposes Underlying Title VII.

For more than a hundred years after the Emancipation Proclamation, the American workplace was marked by deliberate practices designed to restrict black workers to

specific inferior positions and to exclude them altogether from desirable, skilled, high paying jobs.[64/] Judicial findings of exclusion of blacks from the skilled crafts, for instance, "are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers of America v. Weber, 443 U.S. 193, 198 n. 1 (1979), and cases cited therein. Similar

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64/ For a full discussion of the history of blacks in the American workplace, see S. Spero and A. Harris, The Black Worker (Atheneum ed. 1974). See also, G. Myrdal, An American Dilemma at 1079-1124 (Harper & Row ed. 1962). A thorough discussion of black workers during the period from World War I through World War II is found in R. Weaver, Negro Labor, A National Problem (1946), and of blacks in labor unions in R. Marshall, The Negro and Organized Labor (1965); R. Marshall and V. Briggs, The Negro and Apprenticeship (1967); and H. Northrup, Organized Labor and the Negro (1944). For more recent discussions, see H. Hill, Black Labor and the American Legal System: Race, Work and the Law (1977), and W. Gould, Black Workers in White Unions (1977).

judicial findings of racial discrimination and exclusion have repeatedly been made with regard to some forms of public employment as well. See Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 690 (6th Cir. 1979), cert. denied, 101 S. Ct. 783 (1981), and cases cited therein (law enforcement agencies).

Where black workers were not shut out altogether by employers or unions, they were set aside often in segregated locals and separate departments, with little or no opportunity for advancement. In many industries, particularly in the South, seniority systems were designed and manipulated to protect the favored position of white employees and to keep blacks in dead-end jobs and segregated departments. For example, in the decades following the Civil War many companies, including some

which had previously owned slaves, hired blacks to work on the railroads at lower wages than those paid whites. The all-white unions, rather than admitting blacks to their membership and demanding equal wages for all employees in the same job category, demanded instead that black railroad workers be prevented from using their accrued seniority rights to obtain better runs and to advance to higher job classifications. See S. Spero and A. Harris, The Black Worker at 286-315 (Atheneum ed. 1974); H. Hill, Black Labor and the American Legal System: Race, Work, and the Law at 334-72 (1977). Although the overt racial bars have since been removed, the resulting seniority systems are still in effect today. See, e.g., Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365, 1371-74 (10th Cir. 1981). Similar practices of

racial gerrymandering, manipulation of seniority lines, and perversion of seniority systems for racial reasons were common in other southern industries as well.[65/] See H. Northrup, The Negro in the Paper Industry at 74-79 (1969); H. Northrup, The Negro in the Rubber Tire Industry at 32-33, 49-50 (1969); H. Northrup, The Negro in the Tobacco Industry at 26-30, 33-39, 40-41, 87 (1970); C. King and H. Risher, The Negro in the Petroleum Industry at 28-29, 36-38 (1969); L. Rubin, The Negro in the Shipbuilding Industry at 115-16, 127 (1970). Cf. James v. Stockham Valves and Fittings

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65/ "As black workers in the steel industry, in pulp and paper manufacturing, in oil and chemical refineries, in tobacco factories and in other industries have learned, what exclusion is to the craft unions, separate lines of promotion and seniority are to the industrial unions." H. Hill, Black Labor and the American Legal System, supra at 25.

Co., 559 F.2d 310, 347-53 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978) (manufacturing); United States v. Georgia Power Co., 634 F.2d 929, 934-37 (5th Cir. 1981), cert. pending, sub nom, Electrical Workers Local No. 84 v. United States, 50 USLW 3080 (August 25, 1981) (production and transmission of electrical power); Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981) (manufacturing). Thus, as this Court recognized in Teamsters, there are "seniority systems [which are] themselves 'racially discriminatory' or had their 'genesis in racial discrimination' ...." 431 U.S. at 346 n. 28, quoting Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 517 (E.D. Va. 1968).

The Civil Rights Act of 1964 was the first comprehensive federal legislation ever to address the pervasive problem of

discrimination against blacks in modern American society. See M. Sovern, Legal Restraints on Racial Discrimination in Employment 8 (1966). Extensive hearings had focused the attention of Congress on the adverse social and economic consequences of discrimination against blacks in employment and other fields,[66/] and when the House Judiciary Committee issued its report on the bill which became the Civil Rights Act of 1964, it clearly stated that a primary objective of the Act was to

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66/ See, e.g., Hearings on Equal Employment Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 2300-03 (1963); Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

eliminate the effects of discrimination against black citizens:

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.
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> * * *
>
> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities....
>
> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination....

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964 at 2018.

In United Steelworkers of America v.

Weber, 443 U.S. 193 (1979), this Court reviewed the legislative history and concluded that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'" Id. at 202, quoting 110 Cong. Rec. 6548 (remarks of Sen. Humphrey). Congress recognized that blacks were largely relegated to unskilled and semi-skilled jobs, and that since the 1940s the relative position of the black worker had steadily worsened. Id. Congress further recognized that, unless this trend were reversed, the goal of the Civil Rights Act -- "the integration of blacks into the mainstream of American society" -- could not be achieved. Id. at 202-03. Therefore,

> it was clear to Congress that "the crux of the problem [was] to open employment opportunities for Negroes

> in occupations which have been traditionally closed to them," [110 Cong. Rec.] at 6548 (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed.
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> * * *
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> [The enactment of Title VII was] triggered by a Nation's concern over centuries of racial injustice and [was] intended to improve the lot of those who had "been excluded from the American dream for so long," 110 Cong. Rec., at 6552 (remarks of Sen. Humphrey)....

Id. at 203-04.

Title VII was designed to provide powerful and effective remedies for these critical social problems. As this Court has consistently held, "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." Franks v. Bowman

Transportation Co., 424 U.S. 747, 763 (1976), and cases cited therein; County of Washington v. Gunther, 49 USLW 4623, 4628 (1981). The sweeping terms of the statutory prohibition of discrimination reflect the congressional purpose: it is unlawful "to fail ... to hire or to discharge ... or otherwise to discriminate ... with respect to ... compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify ... in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status." 42 U.S.C. § 2000e-2(a) (emphasis added). "As Congress itself has indicated, a 'broad approach' to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination." County of

Washington v. Gunther, 49 USLW at 4628, quoting S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964).

In § 703(h), Congress provided a limited exemption from this broad prohibition of discriminatory practices. As the Court stated in Teamsters, this provision "does not immunize all seniority systems. It refers only to 'bona fide' systems, and a proviso requires that any differences in treatment not be 'the result of an intention to discriminate because of race....'" 431 U.S at 353. In California Brewers Association v. Bryant, 444 U.S 598 (1980), the Court reiterated its view that § 703(h) must not "be given a scope that risks swallowing up Title VII's otherwise broad prohibition of 'practices, procedures, or tests' that disproportionately affect members of those groups

that the Act protects." Id. at 608. The Court's interpretation of § 703(h) thus accords with the longstanding principle of statutory construction that a remedial statute should "be given a liberal interpretation ... [and] exemptions from its sweep should be narrowed and limited to effect the remedy intended." Piedmont & Northern R. Co. v. ICC, 286 U.S. 299, 311-12 (1932). See also, Group Life and Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979); Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976); Peyton v. Rowe, 391 U.S. 54, 65 (1968). Like the general prohibitions of discrimination contained in §§ 703(a) and (d), the exception provided by § 703(h) "must ... be read against the background of the legislative history of Title VII and the historical context

from which the Act arose," United Steelworkers v. Weber, 443 U.S. at 201, and it must be interpreted in a manner which does not "'bring about an end completely at variance with the purpose of the statute'" .... Id. at 202, quoting United States v. Public Utilities Commission, 345 U.S. 295, 315 (1953). In view of the broad approach adopted by Congress, the Court "must ... avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." County of Washington v. Gunther, 49 USLW at 4628.

The importance of seniority rights in the modern workplace underscores the proper construction of § 703(h) as a narrow exception which does not defeat the fundamental purpose of Title VII. As the Court stated in Franks v. Bowman Trans-

portation Co., supra:

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation.... Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority).... We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job. ... More than any other provision of the collective [-bargaining] agreement ... seniority affects the economic security of the individual employee covered by its terms....

424 U.S. at 766 (citations omitted). See also, Cooper and Sobol, Seniority and Testing Under Fair Employment Laws; A General Approach To Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1601-07 (1969).

This Court recognized in Franks that, because seniority rights are so important,

the victims of illegal racial discrimination are presumptively entitled to awards of retroactive seniority which will, insofar as possible, restore them to the positions they would have held in the absence of discrimination. Seniority relief therefore may be denied "'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" 424 U.S. at 771, quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). For the same reasons, § 703(h) is properly interpreted in a manner which both recognizes the intent of Congress to protect seniority systems which meet the statutory criteria from alteration, and does not undermine the fundamental

purposes of Title VII. Section 703(h) was not intended to be an instrument for depriving black workers of the seniority rights which are essential if they are to achieve their rightful place in the mainstream of American society.

B. The Seniority System Was Not Bona Fide, and Differences in Treatment Thereunder Were the Result of Intentional Discrimination

In Teamsters, this Court construed § 703(h) of Title VII, which reads in pertinent part,

> it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system, ... provided that such differences are not the result of an intention to discriminate because of race ....

This section, it was held, meant that a seniority system is not unlawful under Title VII merely because it perpetuates

past discrimination, 431 U.S. at 353.[67/] The Court noted that § 703(h) provides a "measure of immunity" for such systems. This Court cautioned, however, that:

> To be sure § 703(h) does not immunize all seniority systems. It refers only to "bona fide" systems, and a proviso requires that any difference in treatment not be "the result of an intention to discriminate...."

Id. The system challenged by the Government in Teamsters was found to be bona fide, in part, because the system applied equally to all employees, did not have its genesis in racial discrimination, had not been negotiated or maintained with a discriminatory purpose, and the structure of its bargaining units was rational. 431 U.S. at 355-56. It is clear that, after

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67/ Such systems, the court noted, "[w]ere it not for §703(h), ... would seem to fall under the Griggs rationale." Id. at 349.

the decision in Teamsters, a court must examine the "totality" of the circumstances surrounding the adoption or maintenance of a seniority system, and determine whether the system was designed with an intent to discriminate.[68/] The Fifth Circuit prop-

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68/ There is no requirement that a plaintiff show that the challenged action "rested solely on racially discriminatory purposes." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 265 (1977). See also Personnel Administrator of Massachusetts v. Feeney, 442 U.S 256, 276 (1979)("The dispositive question ... is ... whether ... a ... discriminatory purpose has, at least in some measure, shaped [the challenged decision].") That such a showing would not be required is even more true of a Title VII case than in a case premised upon a constitutional violation in view of the rejection of the McClellan Amendment which would have added the word "solely" to the language of the Act. See 110 Cong. Rec. 13837-38. Senator Case made the following observation during the debate on this amendment:

> The difficulty with this amendment is that it would render Title VII totally nugatory. If anyone ever had an action that was motivated by a single cause, he is a different kind of animal from any I know of.

properly applied the law, by looking to the totality of the circumstances and examining in particular the features of the system that this Court found significant in Teamsters. App. 9.

This Court has counseled that, since evidence of discriminatory intent is seldom apparent or direct, the "proof of discriminatory intent must necessarily usually rely on objective factors...." Personnel Administrator of Mass. v. Feeney, 422 U.S 256, 279 n. 24 (1979). See, Washington

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68/ Continued

> But beyond that difficulty, this amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless.

Id. at 13837. Cf. United States v. Bd. of Commr's of Indianapolis, 573 F.2d 400, 411 n. 27 (7th Cir.), cert. denied, 439 U.S. 824 (1978), where the court noted, "an illicit motive may be only subordinate and still affect the outcome of a decision."

v. Davis, 426 U.S. 229, 242 (1976)("... an invidious discriminatory purpose may often be inferred from the totality of the relevant facts ...."). See Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1382 (4th Cir.), cert. denied, 409 U.S. 982 (1972); United States v. Bd. of School Commr's of Indianapolis, 573 F.2d 400, 412 (7th Cir.), cert. denied, 439 U.S 824 (1978). In Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-67 (1977), the Court summarized some evidentiary sources appropriately considered:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action -- whether it "bears more heavily on one race than another," Washington v. Davis, [426 U.S. 229], 242 [(1976)] -- may provide an important starting point. Sometimes a clear pattern, unexplainable on

> grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face....
>
> The historical background of the decision is nmaker's purposes.... Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

Id. at 266-67 (citations and footnotes omitted).

1. Burden of Proof. Like the other provisions of § 703(h), the provision immunizing "bona fide seniority systems" creates an affirmative defense by which an employer or union may demonstrate that its practices are lawful even though they have a discriminatory effect. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405,

425 (1975); County of Washington v. Gunther, 49 USLW 4623, 4625-26 (1981). Cf. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974). Thus, where the plaintiffs establish that a seniority system has a discriminatory impact, the burden shifts to the employer or union to demonstrate that the system is bona fide and that differences in treatment thereunder are not the result of intentional discrimination.[69/]

69/ This placement of the burden of persuasion is entirely appropriate. The burden properly rests upon the party claiming "the benefits of an exception to the prohibition of a statute." United States v. First City National Bank, 386 U.S. 361, 366 (1967). Moreover, having created, operated, and maintained the seniority system, the defendants have superior access to the relevant evidence, and they have a far better opportunity than the plaintiffs to develop the pertinent facts. Cf. Teamsters, 431 U.S. at 359 n.45 "[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the

The district court so held in the present case. App. 25.[70/]

2. Racial practices of the Defendants. In assessing whether an institution has acted with a discriminatory purpose the "historical background... is

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69/ Continued

proof" (citations omitted). Finally, requiring the defendants to bear the burden of persuasion with respect to this affirmative defense is fully consistent with Congress' "'broad approach' to the definition of equal employment opportunity ...." County of Washington v. Gunther, 49 USLW at 4628 quoting S. Rep. No. 867, 88th Cong., 2d Sess. 12 (1964). "The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach." Id.

70/ The Fifth Circuit did not address the question. Since the record contains ample proof that the seniority system was not bona fide and that its adverse effects on black employees were the result of intentional discrimination, the system in this case would be unlawful even if the burden of persuasion were on the plaintiffs.

one evidentiary source, particularly if it reveals a series of ... actions taken for invidious purposes." Arlington Heights, 429 U.S. at 267. Here the Company and the Unions were engaged in overtly racist behavior at the very time that the seniority system was developed.[71/] "[T]here is high probability that where [an institution has] effectuated an intentionally segregative policy in a meaningful portion of [its system], similar impermissible considerations have motivated their actions in other areas of the system." Keyes v. School District No. 1, 413 U.S. 189, 208 (1973); Columbus Board of Education v. Penick, 443 U.S. 449, 458 n. 7 (1979).

71/ Respondents use the term "racist" advisedly to describe practices based clearly and openly on race. See, e.g., pp. 13-17, 21-23, supra.

Each of the three institutions, Pullman-Standard, Machinists and Steelworkers, responsible for the development of the seniority system engaged in blatantly racist practices. Virtually every conceivable employment decision made by Pullman-Standard was influenced by race. For example, the race of an employee dictated the job he was assigned, the facility he could use, the badge number he had, and the hourly wage he received. See Section C.1. a, supra. Also "racial segregation was extensively practiced ... in the local union hall [of the Steelworkers]" App. 39. Black members of the Steelworkers Local at the Bessemer plant had their "place." Until 1974 union members were segregated at meetings and the restrooms remained segregated until the integration of restrooms at the Company

in 1967. Until well after the passage of Title VII blacks always served in two specific positions out of the five elected officer positions in the Local, see p. 16, supra. Most importantly, in the 1950s and 1960s, white union officials refused to process racial grievances.[72/] While blacks had their "place" within the Steelworkers,

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72/ The district court stated tht "[i]t is not without significance that blacks, constituting approximately half the work force, have played a major role in the formation and direction of the USW local, occupying positions as officers, committeeman, and negotiators. While not foreclosing the possibility of discriminatory conduct ... these facts are certainly relevant to the issues before the court." App. 34 n.14. However, black participation must be placed within the context of the segregation at the plant and the union hall, the refusal of white officials to press racial grievances, and the acquiescence by black officials because "it wasn't time for it," see n.22, supra. See also Castaneda v. Partida, 430 U.S. 482, 499 (1977) ("... it would be unwise to presume as a matter of law that human

they had no place within the Machinists. Until 1948 the Machinists limited their membership to "qualified white candidates," see section C.1.c, supra.

3. Development and Maintenance of the Seniority System

If a seniority system's "genesis" was affected by a discriminatory purpose then the system would not receive the protection

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72/ Continued

beings of one definable group will not discriminate against other members of their group.") See also opinion of Marshall, J., concurring: "Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group," (footnotes omitted). Id. at 503.

of §703(h) because the "differences" in conditions of employment would be "the result of an intention to discriminate because of race...." As the Court stated in Teamsters, "a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption." 431 U.S. at 346 n.28.

Where, as here, the seniority system developed in a historical context of "actions taken for invidious purposes," there is a strong inference that these practices affected the system. Arlington Heights Metropolitan Housing Corp., 429 U.S. at 266; cf., Strauder v. West Virginia, 100 U.S. 203, 205 (1880).[73/]

73/ The Steelworkers suggest in their brief that evidence of historical discrimi-

This record demonstrates that "an intent to discriminate entered into

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73/ Continued

nation prior to and during the creation of the seniority system is not relevant to the bona fides question. Brief 40-41 n. 43. This position is contrary to the view this Court has taken in a number of cases stressing the relevance and importance of placing the questioned acts within their historical context. Arlington Heights, supra; Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 456 (1979); Dayton v. Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979); City of Mobile v. Bolden, 446 U.S. 55, 59 (1980). Several courts of appeals have also viewed such evidence as relevant. See, e.g., Lee v. Washington County Bd. of Educ., 625 F.2d 1235, 1237, (5th Cir. 1980); Barnes v. Jones County School District, 554 F.2d 804 (5th Cir. 1977); Resident Advisory Bd v. Rizzo, 564 F.2d 126, 144 (3d Cir. 1977). The petitioners simply seek to evade the fair inference to be drawn: in an era when racial considerations permeated almost every employment decision, it requires only "common sense" to reject any notion that the seniority system escaped the taint of racial discrimination. Keyes, 413 U.S. at 201. There is a logical inference of discrimination, as the district court found, from the evidence that [b]oth in 1941 and in 1954, racial segregation was extensively practiced at the ... plant [and] in the local union hall. ..." App. 39.

[the seniority system's] very adoption." 431 U.S. at 346 n.28. The district court failed to consider adequately the "causative relationship" between the invidious discriminatory practices of the Company and the Unions and the development of the seniority system. Instead it improperly limited analysis of genesis "to the extent of racially discriminatory practices at the time the seniority system came into existence." App. 38. The court refused to consider the racial motivation of one of the parties responsible for the adoption of the seniority system, the Machinists,[74/]

74/ The district court did not consider the motivation of the Machinists because of its view that neither the Steelworkers nor the Company can be "fix[ed] with responsibility... for whatever racial discrimination may have existed in the IAM...." App. 42. This was error. First, the seniority system throughout the plant, including the division between bargaining units, was

and the nature of the division of the plant into bargaining units.[75] Furthermore, the court's failure to apply the proper standard for determining and evaluating evidence relevant to genesis resulted in the court wrongly concluding that although

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74/ Continued

before the Court. See pp. 4-5, supra. Second, whether a seniority system is lawful depends upon whether an invidious purpose affected its adoption; if one of the parties creating the system acted with deliberate discriminatory purpose then the system is unlawful. Third, the relative responsibility of the Machinists, Steelworkers and Pullman-Standard is not relevant to the stage 1 or liability phase which was tried below, but may be relevant to the stage 2 or remedy phase of this which remains to be tried. JA 30 (The issue of monetary relief was "severed for trial, if necessary, at a subsequent date"). Cf. Teamsters, 431 U.S at 360.

75/ The district court erroneously concluded that the NLRB certification of the bargaining units, in effect, insulated this division of the jobs from charges that the parties were racially motivated. See, section 5, infra.

"two times of 'origin' might be examined... 1941-42, when union organizational efforts were finally successful... or 1954, when the seniority system under attack in this litigation became essentially fixed...[,] [s]election of the more appropriate date is not... critical under the circumstances of this case, for the evidence reflects similar practices at both periods." App. 38-39. In fact, the analysis of the genesis of the system must cover the entire period from 1941 through 1954 because the events in 1941-42 and the early 1950s should be clearly distinguished.

The seniority system had its origin in 1941 when several unions sought to represent employees at the Bessemer plant. The major focus -- and for this case the relevant issue -- in the 1941 NLRB hearing was the proposed bargaining units sought by the

Machinists and the Steelworkers[76/], see section B. 2. b, supra. Consistent with its policy of excluding blacks from membership, the Machinists sought an all-white bargaining unit. While the Machinists sought only those jobs staffed by white workers, in its November 1941 certification the NLRB designated jobs which were staffed by blacks and which were functionally related to those claimed by the Machinists. Id. The Machinists, with the agreement of the Company and Steelworkers, transferred to the Steelworkers' unit the jobs containing all 24 of the black employees who had been placed by the NLRB within the Machinists' unit. As a result of this

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76/ In 1941 the Steelworkers were known as the Steel Workers Organizing Committee or "SWOC". Subsequently, the name was changed to the United Steelworkers of America. App. 35, n. 15.

gerrymandering, the Machinists obtained an all-white unit, and created five one-race departments which had not existed prior to unionization. See section B.2.b, supra.

As the Fifth Circuit concluded, "the IAM manifested an intent to selectively exclude blacks from its bargaining unit, NLRB certification considerations notwithstanding. That goal was ultimately reached when maneuvers by the IAM and USW resulted in an all-white IAM unit." App. 14-16. The Machinists' unit remained all-white until 1970. App. 7. The division of the plant into bargaining units meant that the jobs in the IAM unit would remain all-white since, as a practical matter, a worker spent his entire career, unless he progressed to management, on the jobs in one bargaining unit, see section B.3.a, supra.

The racially motivated creation of the Machinists' bargaining unit, which resulted in the deliberate carving out of an all-white unit, creates a presumption that other parts of the seniority system which disadvantage blacks are not "adventitious." Keyes v. School District No. 1, 413 U.S. at 208; Columbus Bd. of Education v Penick, 443 U.S. at 458 n 7. Moreover, the accommodation by the Company and the Steelworkers[77] to the racist plans of the Machinists is directly relevant to assessing their intent during the development of

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77/ We note that the Steelworkers had a legitimate interest in expanding their bargaining unit, whereas the Company had no legitimate interest in agreeing to the balkanization of its departments according to racial lines. Nevertheless, the Steelworkers, who were aware of the Machinists' policy of excluding blacks, see pp. 21-22, supra, acquiesced in the IAM's policy by agreeing to the deliberately discriminatory transfer of jobs in December 1941.

the seniority system. See City of Memphis v. Greene, 49 USLW 4389, 4393 nn. 24, 26 (1981).[78/]

78/ Under some circumstances, the lower courts have found evidence of accommodation to the racist goals of others to be sufficient proof in itself of invidious motivation. See, e.g., Arthur v. Nyquist, 573 F.2d 134, 144 (2d Cir. 1978) (finding intentional discrimination because the school board was "strongly influenced by residents who opposed integrated schooling"); Resident Advisory Board v. Rizzo, 564 F.2d 126, 144 (3d Cir. 1977) ("shift in the City's position [following] protests by demonstrators manifesting racial bias" evidences a constitutional violation). Accord Davis v. Schnell, 81 F. Supp. 872, 875, 880-82 (S.D. Ala.), aff'd, 336 U.S. 933 (1949), cited with approval in Arlington Heights, 429 U.S at 267; United States v. Board of School Commissioners, 573 F.2d 400, 412 n. 31 (7th Cir. 1978); United States v. School District 151, 301 F. Supp. 201, 2130 (N.D. Ill. 1969), aff'd, 432 F.2d 1147 (7th Cir. 1970); Hoots v. Commonwealth of Pennsylvania, 359 F. Supp. 807, 822-23 (W.D. Pa. 1973), appeal dism'd, 495 F.2d 1095 (3d Cir.), cert. denied, 419 U.S. 884 (1974) ("A school board may not, consistently with the Fourteenth Amendment ... permit educational choices to be influenced by a policy of racial segregation in order to accommodate community sentiments").

After the unionization of the plant, another critical period in the development of the seniority system occurred in the mid-1950s. At that time the importance of seniority increased substantially within the Steelworkers' unit for several reasons: (1) the scope of the seniority was broadened from "occupational" to "departmental," (2) the discretion of the Company to transfer employees without any loss of seniority to the employee was substantially reduced, and (3) the use of seniority was extended to the determination of promotions, see p. 39, supra. Just before the important switch in 1954 to departmental seniority, the Steelworkers and the Company created seven new one-race departments within the Steelworkers' bargaining unit: Air Brake Pipe Shop, Boilerhouse, Die and Tool, Janitors, Plant Protection, Power-

house, and Steel Miscellaneous, see section B,3.b, supra.[79/] All of the departments were carved out of departments which contained both white and black employees.[80/] Id.

79/ The history of the Air Brake Pipe Shop is illustrative of the manipulation of departments at the plant. Before unionization the Air Brake Pipe Shop was included within the racially mixed Steel Erection department. The jobs in this department were functionally related, see n.32, supra. As a result of the certification of the IAM, the Air Brake Pipe Shop became an all-white department within the IAM unit, see p. 32, supra. In 1944 when the IAM ceded several departments to the Steelworkers the Air Brake Pipe shop was returned to the Steelworkers unit and in 1947 with the application of "occupational" seniority the Air Brake Pipe Shop was reabsorbed in the Steel Erection department, see n.46, supra. Then in 1954 just before the return to departmental seniority, the Air Brake shop was once again split from the Steel Erection department in order to form an all-white department. See p. 42, supra.

80/ The district court's brief discussion of the possible "rationality" of the creation of some of these departments (App. 32) ignores the inference raised by the circumstances surrounding the creation of the one-race departments with attendant segregative effect. See pp. 121-22, infra.

The seniority system which was "fixed" by the mid-1950s had essentially developed, as the district court indicated, during two periods, the unionization process in 1941 and the major changes in the application of seniority within the Steelworkers' unit in the 1950s. During both these periods the number of one-race departments was substantially increased. The consequences of the creation of the all-white IAM bargaining unit in 1941 and the creation of one-race departments within the Steelworkers' unit were continued by the seniority forfeiture provisions governing transfer between departments or bargaining units. These forfeiture provisions amounted to a no-transfer rule, see section B.4, supra.[81/]

81/ The "lock-in" consequences for white workers within the Steelworkers' unit were

In 1968 the Company negotiated with the Department of Labor a "conditional memorandum of understanding to enhance opportunities of blacks." The implementation of the memorandum was frustrated by the refusal of the Unions to agree to its terms. Similarly, in 1972 the Unions refused to sign another agreement which was "to serve as a corrective action program" and which had been negotiated between the Labor Department and Pullman-Standard. Id.

81/ Continued

much less severe than those for black employees not only because they were located in the higher-paying departments, but also because the higher-paying jobs within racially mixed departments were often reserved for whites. For example, as of 1964, the median job class for all 95 employees within the Forge department was 6, while the median job class for the 53 blacks in the department was 2. Appendix B, Table 3.

Where a "sequence of events" leads inevitably to increased segregation and where the actors involved constantly refer to race in making decisions, then the racial purpose of the actors is manifest. Dayton Bd. of Education v. Brinkman, 443 U.S. at 538; Columbus Bd. of Education v. Penick, 443 U.S at 564, n. 13; see Arlington Heights, 429 U.S. at 267. The institutions -- the IAM, the Steelworkers, and the Company -- grafted the seniority system onto a plant structure which contained numerous racially identifiable departments and then took a series of actions in 1941 and from 1952 through 1954 which resulted in additional segregation. Moreover, the gerrymandering of departments at these times was not fortuitous but rather corresponded to significant developments in the seniority system which sub-

stantially affected the seniority and job rights of employees. This manipulation by the Company and Unions at critical periods in the development of the seniority system reflects and emphasizes the invidious purpose which affected the system.[82/]

4. Application of the Seniority System and its Effect. In Teamsters, the Court found the seniority system bona fide because, in part, the seniority system "[t]o the extent that it 'locks' employees into non-line-driver jobs, it does so for all. The city drivers .. who are discouraged from transferring ... are not all Negroes ...; to the contrary, the over-

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82/ In Arlington Heights, this Court noted that if a restrictive zoning action had been taken immediately after a board learned of impending construction of integrated housing, a "far different case" would have been presented. 429 U.S at 267. See also Resident Advisory Bd. of Rizzo, 564 F.2d at 144.

whelming majority are white," 431 U.S at 355-56.[83/] Because the Teamsters case involved only two "departments" (city and line drivers), the "locking-in" effect of the seniority system's restriction on transfers between the two "departments" did not disproportionately affect black workers, who were a minority of employees in the less desirable "department." Here, in contrast, the seniority system "locked-in" in the overwhelming majority of black workers into all black, or predominantly black, lower paying departments. There are two separate questions regarding the application or "neutrality": was the system applied equally and what were the racial

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83/ In fact, of the 1284 individuals who were "locked "into the city-driver positions, 1,117 or 87% were white. 431 U.S. at 342, n. 23.

consequences, or degree of adverse impact, of the system.

There is no question that before 1965 the system was applied in a racially unequal manner. Even within a department in the Steelworkers' unit, there were jobs reserved for "whites" and "colored," see p. 14 supra; App. 39. Black workers could not use their seniority to promote to the higher-paying "white" jobs, and the officials of the Steelworkers refused to process grievances based upon racial discrimination, see n.22, supra. The operation of a "dual" seniority system illustrates the racial bias of the Company and unions during the development and maintenance of the system.

In evaluating whether the adoption or continuation of the seniority system was affected by a discriminatory purpose,

the district court refused to look at the adverse impact of the system.[84/] App. 28-29. Even though the court noted that

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84/ The district court stated that it would be a "misreading" of Teamsters to examine the degree of adverse impact, at least where the "rule affects significant numbers of both white and black employees." App. 29. The court indicated, though, that if "a seniority rule were shown to penalize all blacks and no whites, the inference that the rule was racially motivated would seem compelled," id., but -- not finding the "inexorable zero," -- the court rejected the relevance of the statistical evidence. This limited view of statistical evidence in cases of racial discrimination should have been ended by this Court's decisions in Castaneda v. Partida, 430 U.S. 482, 497, n. 17 (1977) and Hazelwood School District v. United States, 433 U.S. 299, 311, n. 17 (1977). Moreover, nothing in Teamsters prevents a district court from examining the racial impact of a seniority system. Rather the Teamsters analysis fully supports such an examination. In Teamsters the Court determined that the "overwhelming majority" of those disadvantaged were white -- a circumstance very different from this case, see section B, 5, supra -- and the court also stressed the importance of statistics in determining discriminatory purpose. 431 U.S. at 356, 339-40.

the "effect of the no-transfer rule ... may well be .. .somewhat greater ... [on] blacks than whites ....," the district court concluded that "a study of relative economic desirability [of the departments] would be inappropriate."[85/] App. 30. As

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85/ In its first decision in this case, the Fifth Circuit reversed the district court's conclusion that a showing of classwide economic harm is necessary to establish a prima facie case of discriminatory departmental assignments. App. 83-84. The district court's ruling that a practice which continued the effects of discriminatory departmental assignment was not unlawful unless there was attendant economic harm was held by the Fifth Circuit to be "inconsonant with the Act and its interpretive cases." Id. This Court agreed in Teamsters: "Title VII provides for equal opportunity to compete for any job, whether it is thought better or worse than another," 431 U.S at 338, n.18 (emphasis in original).

In its subsequent opinion on the bona fides of the seniority system, the district court incorrectly reasoned that if proof of economic impact is not a necessary element

the Fifth Circuit ruled, the district court erred in refusing to evaluate the adverse impact of the system. The substantial adverse impact of the seniority system and the fact that in general blacks "were relegated to the least remunerative departments" provide critical evidence of the invidious purpose of the Company and Unions. App. 10-12.

For the racial impact of an act is an "important starting point" in determining

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85/ Continued

in a prima facie case, then evidence of economic impact is not probative on the questiona of the motives of those who established the seniority system. App. 29-30. The "holding that the appellants need not show that they were assinged discriminatorily to less desirable departments in order to prove a prima facie case of racial discrimination cannot reasonably be construed to preclude consideration of the fact that by locking blacks into the least remunerative departments a greater impact was felt by blacks than by whites." App. 10.

the existence of discriminatory purpose. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. at 279 n. 25. In determining whether a specific act was undertaken with an invidious motive, it is essential to determine whether the act "bears more heavily on one race than another," Washington v. Davis, 426 U.S 229, 242 (1976), cited in Arlington Heights, 429 U.S. at 266. Again in Teamsters, the Court stated that "[s]tatistics showing racial or ethnic imbalance are ... often a telltale sign of purposeful discrimination," 431 U.S. at 340 n.20, and that in some cases the use of statistics alone has been sufficient "to establish a prima facie case of [purposeful] racial discrimination," 431 U.S. at 339. Furthermore, proof that "actions hav[e] foreseeable and anticipated disparate impact [is] relevant

evidence to prove the ultimate fact, forbidden purpose." Columbus Bd. of Education v. Penick, 443 U.S. at 464; Dayton Bd. of Education v. Brinkman, 443 U.S at 536, n. 9; Keyes v. School District No. 1, 413 U.S. at 198; Washington v. Davis, 426 U.S at 253. (Stevens, J., concurring).

In fact, the overwhelming majority of employees at the plant were located in racially identifiable departments -- those departments where there was a "serious disproportionality" in the racial composition of employees.[86/] In 1964, just be-

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86/ This Court has indicated that if there is a "serious disproportionality" in the racial composition of employees as determined by a proper statistical analysis, then there may be either an inference of or the establishment of a prima facie case of purposeful discrimination. Hazelwood School District v. United States, 433 U.S at 311, n. 17; see Castaneda v. Partida, 430 U.S: at 497, n. 17. The Hazelwood -

fore the effective date of Title VII, 96% or 3727 of the 3875 employees were working in racially identifiable departments. See nn.58-60, supra. The racial identity of the departments was firmly established by 1956 when the seniority system had reached the form in which it operated until the plant closed, see section , B. 5, supra; in 1956 1355 or 86% of the 1579 employees were employed in racially identifiable departments. Appendix B, Table 2.[87/]

86/ Continued

Castaneda analysis has been applied to determine whether there is a "serious disproportionality" in the racial composition of a department. See Appendix B for a detailed description of the methodology.

87/ There were 28 departments in 1964 and 29 departments in 1956, Appendix B, Tables 1 and 2. According to the Castaneda - Hazelwood analysis, 19 departments in 1964 and 18 departments in 1956 were racially identifiable. Id. In addition to those departments, there were three departments in 1964 Boilerhouse, Powerhouse, and

The racial staffing of the departments combined with the "lock-in" effect of the seniority forfeiture or "no-transfer" rule, see section B. 4, supra, had a severe adverse economic impact on blacks. For example, in 1964 eight of the 28 departments had a median job class[88/] of 10 or above; of the 2545 white employees, 1959 or 76.9% were in these "high ceiling" departments as compared to only 230 or 17.3% of the 1325 black employees. See Appendix B,

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87/ Continued

Template, and four departments in 1956 (Boilerhouse, Die and Tool (CIO), Powerhouse, and Template) which had historically included employees of only one race, but which could not be subjected to the statistical determination of "identifiability" because of their size. Nonetheless, their racial composition fits the overall pattern of racial stratification at the plant.

88/ The average hourly rate for a job is determined by the job class assigned to the job, see n.61, supra.

Table 3, section B.5, supra. On the other end of the scale, departments which had a median job class below 5, the racial composition was reversed -- 443 or 21.9% of all blacks were located in these "low-ceiling" departments as compared to only 177 or 5.7% of white employees. Id.[89/]

Finally, the continuing economic burden imposed by the seniority system on

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89/ Unlike the situation in Teamsters, in this case black workers were not only largely excluded from the better-paying departments they were also the "overwhelming majority" in the lower-paying departments. In Teamsters, whites constituted 87% of the employees in the lower-paying city driver position, whereas here whites constituted only 29% of the employees in the lower paying departments even though they constituted two-thirds of the workforce. Moreover, unlike Teamsters where blacks and whites performed the same job in the lower paying department, at the Bessemer plant white workers were employed in the higher paying jobs in racially mixed departments. Thus, the effect of being limited to the lower-paying departments was not as severe for whites as it was for blacks.

black workers is illustrated by the base average hourly wages which in 1973 were paid to workers in the Steelworkers' unit with more than six years of seniority: 551 of 74.1% of all black employees compared to 119 or 15.8% of all white employees earned less than $4.25 an hour, job class 8 or below; 634 or 80.7% of all white employees as compared to 192 or 19.9% of all black employees earned more than $4.40 an hour, job class 10 or above. JA 65. The base average hourly wage for black workers in the Steelworkers' unit was $4.14 as compared to $4.45 for white employees. Id.

Black employees of Pullman-Standard clearly suffered substantial economic losses because of their historical exclusion from the IAM bargaining unit. The two IAM departments, Maintenance (IAM) and Die and tool (IAM) were two of the higher

paying departments at the company. Appendix B, Table 3. On the June 1, 1972 seniority list, the 139 employees in those departments included 128 whites and 11 blacks, with every black in the unit having a seniority date no earlier than 1971. Plaintiffs' exhibit 9 (1974 Trial). The average hourly base rate of employees in the IAM unit was $4.57, whereas blacks in the Steelworkers' unit averaged $4.14. See nn.62-63, and accompanying text. Section 3.b.5. Thus, there was at least a $.43 average hourly wage disparity between workers within the Machinists' unit and blacks in the Steelworkers' unit. 90/

90/ The Company attempts to explain the substantial differences between the wages of black workers and white workers by referring to a chart prepared by the district court for its 1974 decision and to an exhibit introduced by the Company which purported to compare gross earnings of

5. Rationality of the Seniority System. In Teamsters, the Court ruled that the system was bona fide because, in part, it was "rational, in accord with the industry practice, and consistent with National Labor Relations Board precedents,"

90/ Continued

black and white workers. Brief 10-11. The company's explanation fails for several reasons.

First, the Fifth Circuit in its initial decision in this case found that the chart was filled with "patent inaccuracies" and that "[i]t does not amount to a convincing showing by a statistically fair exhibit of earnings equality" (footnote omitted). App. 89. The reasons for the appellate court's rejection of the chart were carefully described, id., 80-83. It is important to note that the Steelworkers seriously misstate the Fifth Circuit's ruling regarding the chart, Brief 21a-22a. The Steelworkers indicate that the Fifth Circuit did not find "clearly erroneous" the district court's conclusion that the chart was a "rough index" of the earnings potential of the departments. In fact, the Fifth Circuit simply found that the district court was not wrong in describing what the "chart shows," emphasis in

footnote omitted. 431 U.S. at 356. The system presented in Teamsters, the division

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90/ Continued

original. App. 82. However, this was not significant since the Fifth Circuit went on to find that the "chart contained patent inaccuracies" in representing the record evidence. App. 89.

Second, the Fifth Circuit in its 1976 opinion properly rejected the gross earnings evidence presented by Pullman-Standard as "indicia of even rough wage parity in 1973" (emphasis added, footnote omitted) because the company did not consider "seniority, overtime and time worked." App. 99, see also App. 99 n. 48.

Third, the Fifth Circuit remanded the case in 1976 for the district court to consider specifically the relative economic effect of the system on blacks and whites. App. 97-100. In light of the "patent inaccuracies" of the district court's chart on earnings and its "inexplicab[le]" discussion of earnings, App. 92-98, the Fifth Circuit carefully defined the nature of the "prima facie inquiry" in order "to eliminate the likelihood" that "[e]rrors apparent in prior proceedings" would "recur on the reconsideration we now mandate." App. 90. However, the district court failed to follow the mandate and the prior errors did recur. Specifically, the lower

of city drivers and line drivers into separate units, was simple and universally applied, id., 356 n. 42. Where, as at Pullman-Standard, a plant contains hundreds of jobs separated into more than twenty departments and several bargaining units, the inferences[91/] concerning motivation are often more difficult to draw.

90/ Continued

court did not examine the relevant evidence of the economic harm of the seniority system. Such an examination "is especially pertinent here" where "in general blacks have more seniority than whites." App. 99.

91/ Unlike a finding that a system was specifically adopted or maintained with a discriminatory purpose, see section 3, supra, a determination of "irrationality" would not necessarily compel a conclusion that a system is non-bona fide but rather would lead to an inference that the system was designed with a discriminatory purpose. This follows from the fact that Title VII proscribes discrimination but does not mandate rationality. However, there is a logical inference that an irrational system which has a discriminatory effect was created with the intent to achieve that effect.

As a practical matter, in a plant as large as the Bessemer plant there are many alternatives which may be deemed an "appropriate" unit by the NLRB or may be consistent with the practices in some other plant. In this context, an inference of discriminatory intent may be compelled not only in the case where an irrational practice is adopted but also in the case where an alternative which promotes segregation is selected from among several "rational" alternatives. What the Company and Unions intend "may be plain from the results [their] actions achieve, or the results they avoid." Personnel Administrator of Mass. v. Feeney, 442 U.S. at 279, n. 24; see United States v. Texas Education Agency, 564 F.2d 162, 166 (5th Cir. 1977), cert. denied, 443 U.S. 115 (1979).

There are several critical facts relevant to an evaluation of the rationality of the divsion of the Bessemer plant into separate bargaining units represented by the Steelworkers and the Machinists. First, the splitting of the pre-unionization departments, Die and Tool and Maintenance, into two parts with each subpart represented by a separate union created additional one-race departments. Second, the division of these departments was unique among the plants operated by Pullman-Standard. App. 35, 11. Third, the Machinists sought to pick and choose among production jobs for inclusion in its unit, see section B. 2.b, supra. Fourth, the Machinists sought to include only those jobs staffed by whites and to exclude expressly those jobs staffed by blacks, see see pp. 26-31, supra. Fifth, just after

the NLRB in its 1941 certification included in the Machinists' unit several jobs staffed by blacks which were functionally related to jobs the Machinists had claimed, the Machinists entered into an agreement with the Company and the Steelworkers which transferred to the Steelworkers' unit all jobs staffed by blacks, see section B. 2.b, supra. Sixth, in keeping with its racially exclusionary membership policies, the Machinists achieved an all-white bargaining unit.

The district court refused to examine this evidence of the manipulation of jobs according to the race of the incumbents because the Company and the Steelworkers "are not chargeable with responsibility for those events" and because the division of the plant into bargaining units "was ... required by a specific decision of the NLRB

and the outcome of elections." App. 36. As discussed earlier, the district court erred in refusing to consider the motives and actions of the Machinists in assessing whether the system was adopted or maintained with an intent to discriminate, see p. 94-95, supra. Furthermore, the district court erred in failing to analyze the certification process and to determine whether racial considerations infected the process. Teamsters imposes a duty to examine fully the genesis of the system, its rationality and the relevant historical background. The district court contravened that duty when it erected NLRB certification as a bar to exmining the genesis and rationality of the seniority system. The determination that a system may be "appropriate" and lawful under the National Labor Relations Act, 29 U.S.C. §§ 151, et

seq., does not preclude a finding that the system is unlawful under Title VII. Cf. Alexander v. Gardner-Denver Company, 415 U.S. 36, 47 (1974) ("Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination," (footnote omitted); Taylor v. Armco Steel Corporation, 429 F.2d 498, 499 (5th Cir. 1970). Moreover, if the precedents of the NLRB are properly understood, then it becomes clear that the Board did not sanction the racial consequences of the bargaining unit division and that a division along racial lines was contrary to general principles which the Board had established.

When the NLRB certifies an appropriate unit, the Board does not determine "the only appropriate unit, or the ultimate

unit, or the most appropriate unit; the Act requires only that the unit be 'appropriate'." Morand Bros. Beverage Co., 91 NLRB 409, 418, enforced, 190 F.2d 576, 581 (7th Cir. 1951). The units certified by the Board were not, as the district court stated, "required" by the Board. Rather, the units reflected the desires of the petitioning unions as well as general considerations used by the Board in determining an appropriate unit. Moreover, the Unions and the Company failed to abide by the original NLRB certification. The parties gerrymandered the certification and established an all-white bargaining unit for the Machinists.[92/]

92/ This private agreement between the Machinists, Steelworkers and Pullman-Standard was submitted for the approval of the NLRB. JA 170-71, see section B. 2. b, supra. Where a supplemental agreement has the consent of all interested parties and

In 1941 it was not the practice of the NLRB to refuse to certify a union which was likely to represent its employees unfairly, or which had discriminatory admission policies.[93/] The NLRB did have a policy

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92/ Continued

goes unchallenged, the NLRB would have no occasion to investigate the agreement. Where the unions are in agreement as to the scope and composition of the unit, or where the employer enters no objection, the Board generally finds appropriate the agreed upon unit. See e.g., 7 NLRB ANN REP. 60 (1942); 8 NLRB ANN. REP. 53 (1943); 9 NLRB ANN. REP. 33 (1944).

93/ The racially discriminatory membership policies of the Machinists were notorious, n. 24 and accompanying text, supra. See also, Brashear Freight Lines, Inc., 13 NLRB 191 (1939). However, the Board maintained that it had "no express authority to remedy undemocratic practices within the structure of union organizations," and lacked "authority to insist that labor organizations admit all the employees they purported to represent to membership, or to give them equal voting rights ...." Larus and Brother Co., 62 NLRB 1075, 1082 (1945). Consequently, the Board considered evidence of a union's admission

against certifying avowedly discriminatory bargaining units.[94/] The policy, however, was not enforced unless the intention to exclude black workers from the bargaining unit (not merely union membership) was explicit and overt.

For example, the Board certified unions notwithstanding allegations of past

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93/ Continued

policies irrelevant to certification proceedings and routinely rejected offers of proof that the union's membership policies were racially discriminatory. Veneer Prods, Inc., 81 NLRB 492 (1949); Pacific Maritime Association, 112 NLRB 1280 (1955).

94/ "The color or race of employees is an irrelevant and extraneous consideration in determining, in any case, the unit appropriate for the purposes of collective bargaining. We have consistently refused to delimit units on the basis of race .... [To allow race to be a factor] would be contrary to the spirit of the Executive Order [No. 9346] and the established principles of this Board," Matter of U.S. Bedding, 52 NLRB 382, 388 (1943) (emphasis added).

discriminatory representation, Coleman Co., 101 NLRB 120 (1952), and of discriminatory denials of membership Norfolk Southern Bus Corp., 76 NLRB 488 (1948); Texas and Pac. Motor Transportation Co., 77 NLRB 87 (1948). But where the petition for representation itself expressly proposed to exclude blacks from the bargaining unit on the basis of race, Larus and Brother Co., 62 NLRB 1075 (1945), Aetna Iron and Steel Co., 35 NLRB 136 (1941), or where evidence was introduced that the designation of units was based upon distinctions of race, Union Envelope Co., 10 NLRB 1147 (1939), Utah Copper Company Co., 35 NLRB 1295 (1941); Matter of U.S. Bedding Co, 52 NLRB 382 (1943), then the Board withheld certification of the proffered units.

If a union camouflaged the racial basis for the selection of a unit, the NLRB

did not look behind simple denials of racial purpose and accepted representations by the union's officers that despite discriminatory membership policies the union would represent all employees in the bargaining unit.[95/] See e.g., Georgia Power, 32 NLRB 692 (1941); Carter Manufacturing Company, 59 NLRB 804 (1944); Norfolk Southern Bus, 76 NLRB 488 (1948). In the representational hearing in this case, the Machinists "claim[ed]" "negro cranemen," JA 149, but in fact the Machinists never claimed any position staffed by black

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95/ The policy of the NLRB was criticized by commentators. Sovern, The National Labor Relations Act and Racial Discrimination, 62 Colum. L. Rev. 563, 591-94, 600-04 (1962); Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 156-57, 173-75 (1957); Note, Discrimination in Union Membership 12 Rutgers L. Rev. 543, 545-48 (1958). This policy was later modified, Hughes Tool Co., 147 NLRB 1573, 1577-78 (1964); but see Handy-Andy, Inc., 228 NLRB 447 (1977).

workers. Consistent with the practices of the Board, the NLRB's Trial Examiner stopped any questioning concerning the racial admission policies of the Machinists, JA 145. By failing to admit openly any racial motivation and by its perfunctory remark regarding "negro cranemen" in the representational hearing and then by entering into a private agreement with the Steelworkers and Pullman-Standard which "corrected" the units certified by the NLRB, the Machinists obtained an all-white bargaining unit.

Relying upon the representations of the Machinists and the supplemental agreement of all the parties, the NLRB did not consider whether the bargaining unit proposal was affected by discriminatory motivation. Absent admission by the IAM of its discriminatory purpose, the NLRB's

policy against designating bargaining units by race was successfully thwarted.[96/] The Fifth Circuit correctly ruled that the motivation of the Machinists "to exclude black workers from its bargaining unit" and the manner in "which the two seniority units were set up" were "significant" in determining that the seniority sytem was unlawful. App. 15-16.

The district court briefly discussed the rationality of the departments within the Steelworkers' unit. The court noted

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96/ While the Board aggressively stated its policy against racially exclusionary bargaining units, 8 NLRB ANN. REP. 57 (1943), the policy was implemented only where the Board was confronted with overtly segregated bargaining units. The NLRB did not approach the certification process as a vehicle for challenging discriminatory union membership policies or for determining whether proposed bargaining units, purportedly neutral, were drawn with an intent to discriminate. See, n.93, supra.

that several of the departments "criticized by the plaintiffs" were found at one of the other plants operated by Pullman-Standard,[97/] but that other departments were unique to the Bessemer plant.[97/] The district court further stated that "[i]ndividual differences in the departmental structure at Pullman's Bessemer and Butler

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97/ Those departments were the Inspector, Boilerhouse, Railroad and Janitors App. 37. In fact, the district court erred, for the lists of departments of the Hammond and Butler plants do not indicate that there was a Boilerhouse department in either plant. JA 206, 242.

98/ Those departments were the separate Die & Tool and Maintenance departments and Air Brake Pipe shop. App. 35, 37. In addition to these departments noted by the district court, there was no Boilerhouse department at the other plants, nor was there a separation of the Steel Miscellaneous and Steel Stores departments in the other plants. JA 206, 242. The district court specifically declined to find that it was rational to have separated these departments. App. 31-32, see also section B. 3. b.

plants, such as they are, do not establish that either is irrational or inconsistent with industry practices"; rather, the court suggests that "the ultimate objective should be to comprehend the gestalt of the system." App. 37. In fact, the purpose of the Unions and Company may best be understood in the context of the racial gerrymandering of departments during the periods of increasing importance in departmental structure and seniority: the certification of the Unions in 1941 and the changes in the mid-1950s in the Steelworkers' unit, see section 3, supra. As the Fifth Circuit stated, "the creation of the various all-white and all-black departments within the USW unit at the time of certification and in the years thereafter" was "significant". App. 16.

II.

THE FIFTH CIRCUIT PROPERLY EXERCISED ITS APPELLATE FUNCTION TO CORRECT ERROR BY A DISTRICT COURT.

A. The determination of the proper standard of appellate review begins with Rule 52(a), Federal Rules of Civil Procedure, which provides, in pertinent part,

> In all actions tried upon the facts without a jury ... [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

However, an "'[i]ssue of fact' is a coat of many colors", Watts v. Indiana, 338 U.S. 49, 51 (1949), and an appellate court must pay careful attention to the particular type of "fact" which is presented for review. If a district court "premise[s] its ... finding ... on an erroneous interpretation of the standard to be applied

...," the clearly erroneous rule does not apply, and the findings may not stand. United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960); United States v. General Motors, 384 U.S. 127, 142 (1966); Kelley v. Southern Pacific Co., 419 U.S. 318, 323 (1974).[99] Similarly, a finding of

> so-called ultimate "facts" more clearly implies the application of standards of law ... Though labelled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus the conclusion that may appropriately be drawn from the whole mass of evidence is not always the

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99/ Shortly after the promulgation of Rule 52(a), Judge Learned Hand in an opinion reversing a lower court finding, stated "as we view it [that the finding was governed by a legal principle] the cause comes before us as it did before the district judge; like him, we have only to decide what measure of care the situation imposed." Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co., 139 F.2d 288, 290 (2nd Cir. 1943), cert. denied, 321 U.S. 795 (1944).

> ascertainment of the kind of "fact" that precludes consideration by this Court 100/ (footnote added). Baumgartner v. United States, 322 U.S. 665, 671 (1944) (Frankfurter, J.).

The application of a legal standard by a district court "is not a question of fact within Rule 52(a)." Karavos Compania, Etc. v. Atlantic Export Corp., 588 F.2d 1, 8 (2nd Cir. 1978) (Friendly, J.). The proper application of Rule 52(a) depends not so much upon terminology --

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100/ In Baumgartner the Court applied the rule that the "concurrent findings of two lower courts are persuasive proof in support of their judgments," id., 322 U.S at 670. The Court's determination that findings of ultimate facts may not be due on appeal the same deference as subsidiary facts has provided guidance for the application of Rule 52(a). See e.g., Schultz v. Wheaton Glass Company, 421 F.2d 259, 267 (3rd Cir. 1970); Galena Oaks Corporation v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954); Christopher v. State of Iowa, 559 F.2d 1135, 1138 n. 13 (8th Cir. 1977).

"ultimate" or "subsidiary" fact or conclusion of "law" or "fact" -- as upon an analysis of whether the ruling resulted from the application of a standard of law. "Insofar as the conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law." United States v. Singer Manufacturing Co., 374 U.S. 174, 194 n. 9 (1963).

If findings are covered by Rule 52(a), the appellate court has a duty to review these findings in order to determine whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364,395 (1948). While facts based upon different forms of evidence, "live" witness testimony, deposition

or documentary, are covered by the clearly erroneous rule, cf. United States v. Singer Manufacturing Co., 374 U.S. at 194 n. 9, an appellate court in assessing the validity of the lower court's findings should consider the type of evidence upon which the lower court had relied. For example,

> the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52(a) ... plays only a restricted role ...[in]... a "paper case."

United States v. General Motors Corporation, 384 U.S. 127, 141 n. 16 (1966). Rule 52(a) itself takes into account the relative advantages of trial and appellate courts in assessing different types of evidence by emphasizing that "... due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The distinction between findings based upon "paper" and

those based upon "credibility of witnesses" carried over from the practice in equity where the findings of the trial court based upon credibility of witnesses "had great weight with the appellate court." United States v. United States Gypsum Co., 384 U.S at 395, see District of Columbia v. Pace, 320 U.S. 698, 702 (1944).[101/]

101/ The issue is not, as posed by the Steelworkers, Brief 31 n. 41, whether Rule 52(a) applies to "reviewing district court findings respecting discriminatory purpose." The issues regarding the proper application of Rule 52(a) concern whether the district court used an incorrect legal analysis in evaluating the evidence and whether the appellate court properly reviewed the findings of the district court given the nature of the evidence which was before the lower court.

Contrary to the assertion of the Steelworkers, the circuit courts agree upon the fundamental principles for the application of Rule 52(a). As the Fifth Circuit stated in this case, "[w]here findings ... are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply ...." App. 15 n.6. See also Karavos Campania, etc. v.

B. The Fifth Circuit properly applied Rule 52(a) to this case; it

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101/ Continued

Atlantic Export Corp., 588 F.2d 1, 8 (2nd Cir. 1978); Sears, Roebuck and Co. v. Johnson, 219 F.2d 590, 591 (3rd Cir. 1954); Schultz v. Wheaton Glass Company, 421 F.2d 259, 267 (3rd Cir. 1970) ("We are not, however, bound [to apply Rule 52(a)] by conclusions which are but legal inferences from facts"); Poyner v. Lear Siegler, Inc., 549 F.2d 955, 959 (6th Cir. 1976); Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 686 (6th Cir. 1979), cert. denied, 101 S. Ct. 783 (1981) ("[W]hether prior discrimination occurred is a conclusion of law based on subsidiary findings of fact"); Stewart v. General Motors Corp., 542 F.2d 445, 449 (7th Cir. 1976); United States v. City of Chicago, 549 F.2d 415, 425 (7th Cir.), cert. denied, 434 U.S. 875 (1977); Christopher v. State of Iowa, 559 F.2d 1136, 1138 (8th Cir. 1977); Stevenot v. Norbert, 210 F.2d 615, 619 (9th Cir. 1954).

Moreover, the circuit courts agree that where, as in this case, "the findings of a trial court are based on documentary, rather than oral evidence, they do not carry the same weight on appellate review," although Rule 52(a) applies. Jennings v. General Medical Corp., 604 F. 2d 1300, 1305 (10th Cir. 1979); see also Orvis v. Hig-

recognized that "[f]indings of fact by by the district court in Title VII cases

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101/ Continued

gins, 180 F.2d 537, 539 (2nd Cir. 1950); City of Mishawaka, Ind. v. Am. Electric Power Co., 616 F.2d 976, 979 (7th Cir. 1980).

The three cases which the Steelworkers cite, Brief 31-32 n. 41, as being in conflict with this case, all concerned allegations of discrimination in the promotion of college teachers and all primarily involved the district court's determination of the credibility of witnesses and not the misapplication of legal principles. Sweeney v. Bd. of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980); Manning v. Trustees of Tufts College, 613 F.2d 1200 (1st Cir. 1980); Kunda v. Muhlenburg College, 621 F.2d 532 (3d Cir. 1980). In fact, in Sweeney, a decision cited in both Manning and Kunda, the court expressly stated that Rule 52(a) applies "except where there is some indication that the court misconceived the legal standards," (emphasis added) 604 F.2d at 109 n. 2. In Kunda the issue of whether Rule 52(a) applied was not even before the court since the appellant had conceded its application to the pertinent issue. 621 F.2d at 544.

are not to be set aside unless they are clearly erroneous ... that is, unless the appellate court is 'left with the definite and firm conviction that a mistake has been committed.'" App. 15 n. 6. Applying this standard the Court of Appeals reversed the trial court's 1978 finding of no post-act assignment discrimination because it was "factually unsubstantiated" by the record. App. 8. The Court continued that "[w]here findings, however, are made under an erroneous view of controlling legal principles, the clearly erroneous rule does not apply, and the findings may not stand." App. 15 n.6. The Fifth Circuit determined that the district court's conclusion that the seniority system was neither created nor maintained with a discriminatory purpose was based upon an erroneous appli-

cation of the law.[102] If this Court agrees that the district court misapplied the pertinent legal standard, then it is not necessary to reach the question of whether

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102/ The district court made three principal errors of law specified by the Court of Appeals. The district court failed to consider the motives of the Machinists App. 13-16, failed to consider the degree of segregation fostered by the seniority system or its economic harm upon blacks, App. 10, and to give "due consideration" to the development of separate seniority units and the IAM's role in the development of those units. App. 16; 11. The Court of Appeals' discussion of these issues does not use the words "clearly erroneous" because the district court made no findings of fact on these issues, which it erroneously felt to be inapplicable, as a matter of law, to a determination of the legality of the seniority system.

The district court's erroneous application of legal principles contributed to other erroneous conclusions. The district court failed to consider adequately the creation and maintenance of numerous one-race departments, to consider the racial consequences of changes in the seniority system after the November 1941 NLRB certification, and to examine fully the racial motivations of the Unions and Company. See generally Argument I, supra.

the district court's findings were clearly erroneous, and this Court must affirm the Fifth Circuit unless it concludes that the panel applied an improper legal standard. Kelley v. Southern Pacific Co., 419 U.S. at 323.

The Fifth Circuit further concluded that

> [a]n analysis of the totality of the facts and circumstances surrounding the creation and continuance of the departmental system at Pullman-Standard leaves us with the definite and firm conviction that a mistake has been made (footnote omitted). App. 15.

The Court of Appeals based its ruling not only upon the district court's faulty application of legal standards but also upon its review of the evidence presented on the bona fides of the seniority system. As in General Motors, the evidence was almost entirely documentary; the record presents a "paper case," not a contest

between the credibility of witnesses.[103/] As a result of the nature of the issue, the

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103/ In presenting in its Petition for a Writ of Certiorari the issue as to whether Rule 52(a) was properly applied by the Fifth Circuit, the Steelworkers primarily relied upon two opinions, in which lower court findings of "intent" were reviewed. United States v. Yellow Cab Co., 338 U.S. 338 (1949) and United States v. Oregon State Medical Society, 343 U.S. 326 (1952). Petitioner 22-23. In quoting passages from these cases the Steelworkers omitted critical portions which distinguish these cases from the case at bar; the omitted portions are underlined:

"This Court has already held that the clearly erroneous standard of Rule 52(a), applies generally in reviewing '[f]indings as to the design, motive and intent with which men act [since they] depend peculiarly upon the credit given to witnesses by those who see and hear them', United States v. Yellow Cab Co., 338 U.S. at 341," Steelworkers' Petition 22.

"[T]his Court [has admonished] that 'no case' is more 'appropriate for adherence to [Rule 52(a)]' than one involving 'a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.' Oregon State Medical Society, 343 U.S. at 332 (1952)." Steelworkers' Petition 23.

motives of the Unions and the Company in the design and maintenance of a seniority system during the 1940s and 1950s, voluminous documentary evidence was presented but not a single witness testified before the district court regarding the development of the seniority system, see pp.9-10.

The district court's legal errors influenced its view of the ultimate question, the legality of the seniority system, in several different ways. The court failed to examine pertinent evidence,[104]

103/ Continued

The truncated quotation of these cases by the Steelworkers -- cited again in their Brief 34, 22 n. 42 -- illustrates the fallacy in the arguments presented by the Steelworkers. These cases in fact support the standard of appellate review applied by the Fifth Circuit to this case, where the district court was presented largely with documentary evidence and where the district court improperly applied legal principles.

104/ For example, the court ruled that the motives of the Machinists, one of the very

refused to draw inferences from relevant evidence,[105/] and failed to attribute the proper legal significance to evidence[106/] or to the historical context of the evidence,[107/] and misconstrued the proper analysis for determining discriminatory purpose from objective circumstantial evidence.[108/] See generally Argument I, supra.

104/ Continued

institutions which contributed to the development of the seniority system, were irrelevant.

105/ For example, the court ruled that the NLRB certification insulated the bargaining unit system from an examination of its "rationality" or the effect of racial motivations on its development.

106/ For example, the court did not consider the degree of segregation fostered by the seniority system.

107/ For example, the court did not consider the historical context of the creation in 1941 and from 1952 through 1954 of numerous one-race departments.

108/ For example, the court did not consider whether there was a causal connec-

The Fifth Circuit here, as did the Sixth Circuit in Brinkman v. Gilligan 583 F.2d 243, 248, 251-52 (1978)[109] properly reversed the district court's finding that there was no intentional discrimination and remanded the case for a determination of an appropriate remedy. This Court agreed that the district court had "ignored the legal significance" of relevant evidence and affirmed the Sixth Circuit. 443 U.S. at 535-37, sub nom, Dayton Board of

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108/ Continued

tion between the general discriminatory practices and the "genesis" of the seniority system; nor did the court consider all the practices of the Steelworkers in evaluating their objectives in the development and maintenance of the system.

109/ The Sixth Circuit reversed the district court's determination that the school board had not intentionally discriminated throughout the system because, inter alia, the lower court had not given proper legal significance to the empirical, historical and circumstantial evidence.

Education v. Brinkman [redacted]

Similarly, the Fifth Circuit properly reviewed the decision of the lower court [redacted] in this case and its remand of the action for a determination of an appropriate remedy should be affirmed.[110/]

110/ The Fifth Circuit properly did not remand the action for a fourth trial on the issue of liability. The court reviewed the documentary evidence and concluded that as a matter of law, the seniority system was unlawful. In United States v. General Motors Corp., 384 U.S. at 142 n. 16, the Court "resort[ed] to the record not to contradict the trial court's findings of facts, ... but to supplement the court's factual findings and to assist [it] in determining whether they support the court's ultimate legal conclusion that there was no conspiracy." After concluding that there was a conspiracy, the Court remanded in order that appropriate relief might be fashioned, id., 148. Similarly, in this case efficient judicial administration requires that after 10 years of litigation the issue of liability be finally decided. See Levin v. Mississippi River Fuel Co., 386 U.S. 162, 170 (1967); Bigelow v. Virginia, 421 U.S. 809, 826-27 (1972).

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed.

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APPENDIX A

To some extent the Company and, to a lesser degree, the Steelworkers relied on a chart at JA 336, which purports to relfect changes in departmental organization at Pullman-Standard. Steelworkers' Brief 5 n.7, Company Brief 10. While the chart represents an attempt to depict graphically alterations in departmental configurations from the time of unionization in 1941 to the present, the attempt fails because of numerous inaccuracies in the chart.

Respondents have set forth elsewhere in this brief the changes in department structure which are central to the issue before this Court. See pp. 32-34, 41 n.46, 42-45. However, some of the factual errors that appear in the chart are set forth in this Appendix in an effort to avoid the

confusion and misrepresentation of the factual record which reliance on the chart will most certainly produce.

A. Two Wheel and Axle departments were created in 1941, both of which were created by the division of a department with the same name. After a swap of jobs between the Machinists and the Steelworkers subsequent to the NLRB certification, the newly created all-white Wheel and Axle department came under the jurisdiction of the IAM; whereas the all-black Wheel and Axle department became a separate department under the jurisdiction of the Steelworkers. The chart mistakenly reflects only one Wheel and Axle department in 1942, under the jurisdiction of the Machinists. See pp. 29-32, supra.

B. The departments which were certified to the NLRB - those which existed when Pullman-Standard was unionized and when the first union contracts were signed in 1942 - are reflected in the voting list provided to the NLRB. Plaintiffs' Exhibit 1, JA 243-251. There were also overtime work lists and other configurations of employees used for cost accounting purposes, as distinguished from seniority lists. These employee groupings did not make up seniority units. Company Exhibit 5 (1978 Trial); see also, App. 34 n.12 ("although Wheel and Axle and Truck were listed as a single department for cost accounting purposes, for purposes of seniority they are two departments"). The chart erroneously includes six such employee groupings in 1942, not certified

to the NLRB, which were not departments for purposes of seniority: namely, Railroad, Tool Room, Miscellaneous Stores, Truck/ Tractor, Steel Stores and Crane Service. Plaintiffs' Exhibit 1, JA 243-251.

C. The tool room jobs which did not constitute a separate department in 1942, or any other time subsequent thereto, were ceded to the Steelworkers' unit from the Machinists in 1944. The chart mistakenly shows these jobs as (1) a separate department in 1942 and (2) being ceded to the Steelworkers from the Electrical Workers' unit in 1944. Id., JA 174-75.

D. The IBEW bargaining unit was decertified in 1946 and its jobs were merged into the USW unit. The chart errs in placing the IBEW decertification in 1944. App. 36 n.16, p. 36, supra.

E. The Air Brake Pipe department was created at unionization in 1941, was represented by the Machinists, and became a part of the Steelworkers' unit in 1944. There is no record support for chart delineation of the Air Brake Pipe shop as a separate departmental seniority unit in the years 1944 to 1946. See nn.32, 41, 46; JA 174-75.

F. The Air Brake Pipe shop was reestablished as a separate department in 1954. The chart indicates that the department was created from jobs in one department, Steel Erection. In fact, the department was created by joining jobs from two departments, Shipping Track and Steel Erection. Compare Plaintiffs' Exhibits 8 and 9; see p. 42, supra.

G. The Steel Miscellaneous department first appeared on a February 1953 seniority list which supplemented the 1952 seniority list. Plaintiffs' Exhibit 7 (1978 Trial.) The chart incorrectly shows that the Steel Miscellaneous department was created in June 1952. The district court also made this error. App. 32.

APPENDIX B

TABLE 1. ALLOCATION OF EMPLOYEES BY DEPARTMENT IN 1964 AND ANALYSIS OF WHETHER A DEPARTMENT IS RACIALLY IDENTIFIABLE BECAUSE IT CONTAINS A "SERIOUS DISPROPORTIONALITY" BETWEEN THE EXPECTED AND ACTUAL NUMBER OF BLACKS

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected no. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Air & Brake Pipe Shop	35	35	0	12	4.265	10 in 10^6	*
Boiler House	1	1	0	0	[.407]	.658	
Die & Tool (CIO)	10	0	10	3	[2.164]	.015	*
Die & Tool IAM	78	78	0	27	6.366	9.7 in 10^{11}	*
Forge	95	53	42	32	2.058	.020	*
Inspection	21	21	0	7	3.303	4.78 in 10^4	*
Janitors	12	0	12	4	[2.478]	.006	*
Lumber Stores	29	24	5	10	1.925	.027	
Maintenance (CIO)	138	106	32	47	2.725	3.22 in 10^3	*
Maintenance IAM	93	93	0	32	6.952	1.80 in 10^{12}	*
Misc. Stores	14	6	8	5	[1.810]	.035	
Mobile Crane	5	1	4	2	1.648	.050	
Paint & Shipping Track	272	143	129	93	4.601	2.10 in 10^6	*
Plant Protection	14	14	0	5	[2.768]	2.82 in 10^3	*
Power House	5	5	0	2	1.158	.123	
Press	73	17	56	25	7.658	9.44 in 10^{15}	*
Punch & Shear	176	32	144	60	13.319	8.97 in 10^{41}	*

(Continued on next page)

TABLE 1 (Continued)

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected No. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Railroad	19	10	9	6	1.211	.113	
Steel Constr. Steel Erection	207	39	168	71	14.245	$2.41 \text{ in } 10^{46}$	*
Steel Misc.	304	63	241	104	16.571	$5.65 \text{ in } 10^{62}$	*
Steel Stores	100	4	96	34	13.029	$4.18 \text{ in } 10^{39}$	*
Template	59	10	49	20	7.911	$1.28 \text{ in } 10^{15}$	*
Truck	5	5	0	2	[1.158]	.123	
Welding	24	0	24	8	6.796	$5.38 \text{ in } 10^{12}$	*
Wheel & Axle	1853	1655	198	634	21.333	$1 \text{ in } 10^{99}$	*
Wood Erection	40	25	15	14	.441	.330	
Wood Mill	163	90	73	56	2.851	$2.18 \text{ in } 10^{3}$	*
TOTAL	30	20	10	10	.099	.460	
	3075	2550	1325				

Conclusions: Of the 1325 black employees, 96% or 1,274 were in the 19 racially identifiable departments. Of the 2550 white employees, 96% or 2453 were in the 19 racially identifiable departments.

TABLE 2. (Continued)

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected no. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Railroad	11	4	7	5	1.389	$8.24 \text{ in } 10^{2}$	
Shipping Track	15	7	8	6	.815	.208	
Steel Constr.	91	18	73	39	7.191	$3.22 \text{ in } 10^{13}$	*
Steel Erection	216	42	174	93	11.178	$2.61 \text{ in } 10^{29}$	*
Steel Misc.	71	2	69	30	9.239	$1.24 \text{ in } 10^{20}$	*
Steel Stores	31	5	26	13	4.608	$2.03 \text{ in } 10^{6}$	*
Template	4	4	0	2	[1.826]	$3.39 \text{ in } 10^{2}$	
Truck	26	0	26	11	5.881	$2.04 \text{ in } 10^{9}$	*
Welding	402	325	77	172	9.624	$3.17 \text{ in } 10^{22}$	*
Wheel & Axle	18	11	7	8	.345	.365	
Wood Erection	132	88	44	57	2.223	$1.31 \text{ in } 10^{2}$	*
Wood Mill	26	22	4	11	2.836	$2.28 \text{ in } 10^{3}$	*
TOTAL	1579	907	672				

Conclusions: Of the 672 black employees, 89%, or 601, were in the 18 racially identifiable departments. Of the 907 white employees, 83% or 754 were in the 18 racially identifiable departments.

TABLE 2. ALLOCATION OF EMPLOYEES BY DEPARTMENT IN 1956 AND ANALYSIS OF WHETHER A DEPARTMENT IS RACIALLY IDENTIFIABLE BECAUSE IT CONTAINS A "SERIOUS DISPROPORTIONALITY" BETWEEN THE EXPECTED AND ACTUAL NUMBER OF BLACKS

Department	No. Workers	No. Whites	No. Blacks	Expected No. of Blacks	No. Std. Deviations Between Obs. No. of Blacks and Expected No. of Blacks	Chance Probability	Racially Identifiable Castaneda Analysis
Air Brake Pipe Shop	19	19	0	8	3.779	$7.87 \text{ in } 10^5$	*
Boiler House	3	3	0	1	[1.502]	$6.66 \text{ in } 10^2$	
Die & Tool (CIO)	5	0	5	2	[1.549]	$6.07 \text{ in } 10^2$	
Die & Tool IAM	43	43	0	18	7.563	$1.97 \text{ in } 10^{14}$	*
Forge	56	26	30	24	1.612	$5.35 \text{ in } 10^2$	
Inspection	20	20	0	8	3.877	$5.29 \text{ in } 10^5$	*
Janitors	9	0	9	4	[2.487]	$6.44 \text{ in } 10^3$	*
Lumber Stores	24	17	7	10	1.360	$8.69 \text{ in } 10^2$	
Maintenance (CIO)	63	48	15	27	3.063	$1.10 \text{ in } 10^3$	*
Maintenance IAM	32	32	0	14	4.904	$4.7 \text{ in } 10^7$	*
Misc. Stores	9	4	5	4	[.439]	.330	
Mobile Crane	4	2	2	2	[.188]	.547	
Paint	110	74	36	47	[2.158]	$1.55 \text{ in } 10^2$	*
Plant Protection	10	10	0	4	2.82	$2.04 \text{ in } 10^3$	*
Power House	4	4	0	2	[1.247]	.106	
Press	44	12	32	19	3.996	$3.22 \text{ in } 10^5$	*
Punch & Shear	81	65	16	35	4.211	$1.22 \text{ in } 10^5$	*

(Continued on next page)

Methodology

The method of analysis used to determine "serious disproportionality" is the one suggested in Hazelwood School District v. United States, 433 U.S. 299, 311 n. 17 (1977), and Castaneda v. Partida, 430 U.S. 482, 497 n. 17 (1977). This analysis which employs the statistical hypothesis of nondiscrimination (that "decisions were being made randomly with respect to race") was applied to the racial allocation of employees in each department. The statistical hypothesis of nondiscrimination implies that, as regards the attribute of race, the employees of any particular department ought to be viewed as a random sample drawn from the total workforce. It further implies that black employees should be represented in each department in the same proportion as their representation in

the total workforce, but for chance factors.[1/] If B is that proportion, and N is the number of employees in a particular department, the expected number of blacks, e, is B times N; this is then compared with the corresponding actual observed number of blacks, o. The standard deviation, S, needed for this comparison is the square root of N times B times W, with W being the proportion white employees in the total workforce. The quantity o minus e, divided by S, yields a ratio, z, which measures the discrepancy between observed and expected

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1/ The use of the hypothesis is fully justified on this record where there is no finding that there was any skill difference which explains the disparity in departmental assignments between black and white employees. App. 81. In fact on this record it is admitted that assignments were based on race and that the skills of black workers would simply not be considered when filling "white" jobs. App. 39.

numbers in terms of the number of standard deviations by which they are apart. This ratio can be referred to the normal probability distribution to ascertain the probability of such a discrepancy occurring by chance. A discrepancy of more than two or three standard deviations "undercut[s] the hypothesis that decisions were made randomly with respect to race." Castaneda, 430 U.S. at 497, n. 17.

This analytical process will be illustrated using the Forge Department in 1964. For that year, B ÷ 1325 - 3875 or .3419. Since that department then had 95 employees, e = .3419 times 95, or 32.5, versus an observed number, 42, of blacks. The standard deviation is the square root of 95 times .3419 times .6581, or 4.6234. The ratio, z, has the value (42 - 32.5) ÷ 4.6234 = 2.0548; i.e., the

disparity is one of slightly more than two standard deviations. The probability is that such a disproportionate racial distribution would occur by chance in only 2 out of 100 samples. See Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 Harv. L. Rev. 793, 800 (1978); Dawson, Are Statisticians Being Fair to Employment Discrimination Plaintiffs? 21 Jurimetrics 1, 7-8, 20 (1980).

Carrying out this process for each of the 29 departments in 1956, we find disparities of more than two standard deviations in 18 of them, which include 89% of the black employees. In 1964 there were 28 departments, 19 with disparities greater than two standard deviations. These 19 departments include 96% of the

black employees.[2/]

It should be noted that, in these analyses above, the normal distribution model is not applicable when the expected number is less than 5. See P. Hoel, Introduction to Mathematical Statistics 82 (4th ed. 1971). When this is the case, the probability model that should be used is the hypergeometric, but when, as here, the sample sizes (total numbers of em-

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2/ In addition to the 19 departments in 1964 and the 18 departments in 1956 which were racially identifiable according to the Castaneda-Hazelwoood analysis, there were other departments which had historically included employees of one race. In 1964 there were three such departments, Boilerhouse, Powerhouse, and Template, and in 1956 there were four such departments, Boilerhouse, Die and Tool (CIO), Powerhouse, and Template. Using this statistical method the size of these departments does not permit a statistical conclusion of "identifiability".

ployees in the workforce, by race) are large, the more convenient binomial model may be used. Hoel, supra, at 67-68. The binomial was used, as needed, for half a dozen departments in each of the two years. The probabilities thus obtained were referred to the normal probability curve to get an equivalent number of standard deviations.[3/]

3/ The "number of standard deviations" on Tables 1 and 2 has been placed in brackets whenever the binomial model was used as described above. No department was determined to be racially identifiable unless the probability of the observed racial composition occurring by chance would be less than .05 (5 chances out of 100).

Source of Data

The number of employees in each department for the year 1956 was taken from plaintiffs' exhibit 11 (1978 Trial), and for the year 1964 from plaintiffs' exhibit 2 (1974 Trial). Both of these exhibits are seniority lists which were maintained by the Company. The racial identification of the employees was determined from the employees' numbers which were assigned on the basis of race. See n.11, supra.

TABLE 3. RANKING OF EARNINGS OPPORTUNITIES IN DEPARTMENTS AS OF 1964 ON THE BASIS OF MEDIAN JOB CLASS, AND THE ACCUMULATED PERCENTAGE OF BLACKS AND WHITES IN A SPECIFIC DEPARTMENT AND ALL OTHER DEPARTMENTS WITH A HIGHER MEDIAN JOB CLASS

Department	Median Job Class	Median Job of Blacks	No. Blacks	No. Whites	% Black	% White	[Accumulated %] Black	White
Template	18	---	0	5	0	100	0.0	0.2
Power House	16	---	0	5	0	100	0.0	0.4
Die and Tool (IAM)	14	---	0	74	0	100	0.0	3.3
Maintenance (CIO)	13	4	32	106	23.2	76.8	2.4	7.5
Inspection	12	---	0	21	0	100	2.4	8.3
Welding	10	6	198	1655	10.7	89.3	17.3	73.3
Maintenance (IAM)	10	---	0	92	0	100	17.3	76.9
Boiler House	10	---	0	1	0	100	17.3	76.9
Paint and Shipping Track	7	6	129	143	47.4	52.6	27.0	82.5
Railroad	7	7	9	10	47.4	52.6	27.7	82.9
Steel Erection	6	6	241	63	79.3	20.7	45.9	85.4
Steel Construction	6	6	241	63	81.2	18.8	58.6	86.9
Forge	6	2	42	53	44.2	55.8	61.8	89.0
Wheel & Axle	6	6	15	25	37.5	62.5	62.9	90.0
Air Brake Pipe Shop	6	---	0	35	0	100	62.9	91.4
Truck	6	6	24	0	100	0	64.7	91.4
Miscellaneous Stores	6	7	8	6	57.1	42.9	65.3	91.6
Plant Protection	6	---	0	14	0	100	65.3	92.2
Wood Mill	5	2	10	20	33.3	66.7	66.1	93.3
Did & Tool (CIO)	5	5	10	0	100	0	66.9	93.3
Mobile Crane	5	5	4	1	80.0	20.0	67.2	93.3
Punch & Shear	4	4	144	32	81.8	18.2	78.1	94.1
Wood Erection	4	2	73	90	44.8	55.2	83.6	97.8
Press	4	4	56	17	76.7	23.3	87.8	98.5
Lumber Stores	3	3	5	24	17.2	82.8	88.2	99.5
Steel Miscellaneous	2	2	96	4	96.0	4.0	95.4	99.7
Steel Stores	2	2	49	10	83.1	16.9	99.1	100.1
Janitors	1	1	12	0	100	0	100.1	100.1
Total			1325	2545				

For Table 3 the worker population of the plant was defined as including all workers in non-IAM jobs whose job classes were specified in plaintiffs' exhibit 12 4/ (that is all workers except those on salary) and all workers in the Die and Tool (IAM) and Maintenance (IAM) Departments, excluding Foremen. Job class equivalents for IAM jobs were determined by assigning each IAM job to the job class whose hourly wage (as given in the agreement between the Company and the Steelworkers, November 1,

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4/ The accumulated percentage figure for each department is determined by adding to the previous number in the column (or to zero, at the top of the chart) the percentage of the plant's workers of the given race who work in the given department. Thus, the figure shows what percentage of the plant's workers of the given race work either in the given department or in those preceding it on the chart. This exhibit lists employees in the Steelworkers' unit by job class.

1965, Company exhibit 263, p. 5, 1978 Trial) was closest to the hourly wage of the given IAM job (as set forth in the agreement between the Company and IAM, November 1, 1965) Plaintiffs' exhibit 29, pp. 55-56, (1978 Trial). See 7 supra. In cases where there was a range of wages for an IAM job, the median wage was used.

The median job class is that job class, below or above which exactly half of the positions held by the workers in the given group fall. Median job classes for each department as a whole, and for the black workers only in each department, have been determined and listed separately. The departments are listed in decreasing order of median job class. Multiple departments with the same median job class are listed in decreasing order of size.

Plaintiffs' Exhibit 12, a list of employees by job class in 1964 totals 74 white employees in Die and Tool (IAM) and 92 white employees in Maintenance (IAM). Plaintiffs' Exhibit 2, which serves as the basis for Table 1 the seniority list for 1964 includes 78 white employees in Die and Tool (IAM) and 93 white employees in Maintenance (IAM). In other respects the exhibits reflect the same number of employees in each department.